TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1941~~ 1942

No. ~~980~~ 30

LAWRASON RIGGS, JR., SPECIAL GUARDIAN,
PETITIONER,

vs.

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO,
BYRON CLARK, JR., AS EXECUTOR, ET AL.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1942.

CERTIORARI GRANTED MARCH 30, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 980

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vs.

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., AS EXECUTOR, ET AL.

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[fol. 1] **IN COURT OF APPEALS OF NEW YORK**

In the Matter of the Petition for the Judicial Settlement of the Account of Proceedings of GIOVANNI DEL DRAGO and BYRON CLARK, JR., as Executors of the Last Will and Testament of Josephine del Drago, Deceased, and for a construction of Said Will and for Instructions

GIOVANNI DEL DRAGO, Individually and MARCEL DEL DRAGO, Appellants,

BYRON CLARK, JR., as Executor, LAWRASON RIGGS, JR. and Harold W. Hastings, Special Guardians, Corn Exchange Bank Trust Co., as Trustee, Respondents

STATEMENT

This proceeding for the judicial Settlement of Executors accounts was commenced on January 31st, 1940, by filing the Executors petition and the issuance of a citation, returnable on March 15th, 1940. On March 22nd, 1940, Lawrason Riggs was appointed Special Guardian for five infants, children of Mario del Drago, resident in Italy. On March 20th, 1940, Harold W. Hastings was appointed Special Guardian for five other infants, children of Clemente del Drago, resident in Italy. The names of the individuals in each group are set forth in the Executors petition (page 26). Said Special Guardians had theretofore been designated to receive service of the citation, which was also served by publication and mailing.

[fol. 2] Clemente Francesco del Drago, son of Marcel del Drago, was born during the pendency of the proceeding. A supplemental citation issued to said infant, for whom Harold W. Hastings was designated to receive service on October 14th, 1940, and after such service and publication and mailing, was appointed Special Guardian. Citation was returnable December 3, 1940.

Giovanni del Drago, as Executor, appeared by Ludwig M. Wilson, attorney, and Byron Clark, Jr., as Executor by Grant, Clark & Fox, attorneys.

Giovanni del Drago, individually, appeared by Robert W. Maloney, attorney, and filed an answer and objections on April 11th, 1940.

Marcel del Drago appeared by William J. Donovan and David Teitelbaum, attorneys, and filed objections on April 12th, 1940.

The Corn Exchange Bank Trust Co., Trustee, appeared by Laughlin, Gerard, Halpin & Graham, attorneys, and filed objection on April 15th, 1940.

Guiseppe Vitagliano and Yorktown Building Corporation, claimants, appeared by Samuel R. Kurzman, attorney, and filed objections, July 24, 1940.

Lawrason Riggs, Special Guardian, filed reports on April 12th, 1940, and August 2nd, 1940.

Harold W. Hastings, Special Guardian, filed reports on April 16th, 1940, August 2nd, 1940, and December 12th, 1940.

The hearing commenced on June 25th, 1940. By affidavit verified July 8th, 1940, amending the original account, and by petition of the Executors, verified July 5th, 1940, praying for judicial settlement of a supplemental account, the accounting period was extended from October 31st, 1939, through June 15th, 1940. The hearing continued on October 14th, 1940.

[fol. 3] The Surrogate's decision was filed October 21st, 1940. Final decree was entered November 19th, 1940, and supplemental decree December 24th, 1940.

Notice of appeal from the original decree was filed on December 19th, 1940, and from original and supplemental decree on January 17, 1941.

Ludwig M. Wilson was substituted as attorney for Marcel del Drago in place and instead of William J. Donovan and David Teitelbaum, January 17th, 1941, and designated jointly with Robert W. Maloney, as attorney for Giovanni del Drago, on January 17th, 1941. There has been no change of parties or attorneys except as hereinbefore set forth.

A total of $299,726.21 has been paid for estate taxes, comprising $229,726.21 paid with the Federal, and $70,000.00 with the State return. No final determination of exact liability has yet been made.

The Executors have made partial distribution of the legacies by payment of $220,000 to Giovanni del Drago, on account of $300,000, and by payment of $147,521.88, on account of $200,000, into the trust, of which Marcel del Drago is life tenant.

After making the foregoing, and all payments, directed by the decree, the Executors had on hand a balance of $51,454.06, in cash, and other personal property of the inventory value of $136,909.42. The resulting total of $188,363.48 has been diminished by $5,000, which the Executors have paid to the residuary trustee, as a partial distribution of principal. It is also chargeable with the unexpended [fol. 4] cost of a permanent tomb, not exceeding $10,000 as authorized by the decree, and with any deficiency in estate taxes assessed on final determination.

Decedent's real estate, rehabilitated by the Executors at an expenditure of $123,019.72 was turned over to the residuary trust on January 1, 1940, as part of the residuary estate, passing under the 9th paragraph of the will. Out of the income, $6,194.78 was amortized up to January 1, 1941, so that the residuary trust has had a total of $11,194.78 in cash, inclusive of the $5,000 paid by the Executors as a partial distribution of principal in discharge of the residuary legacy.

IN SURROGATE'S COURT, COUNTY OF NEW YORK

In the Matter of the Petition for the Judicial Settlement of the Account of Proceedings of GIOVANNI DEL DRAGO and BYRON CLARK, JR., as Executors of the Last Will and Testament of Josephine del Drago, Deceased, and for a Construction of Said Will and for Instructions

NOTICE OF APPEAL TO COURT OF APPEALS

Please Take Notice that Giovanni del Drago, in his capacity as an individual as distinguished from his capacity as executor of the above named decedent, and as her husband [fol. 5] and as a legatee named in her Will, and as a respondent cited to appear upon the judicial settlement of the account of the proceedings of the executors herein, and Marcel del Drago, a legatee named in said Will, and a respondent similarly cited to appear, hereby appeal pursuant to the provisions of Section 588 of the Civil Practice Act, Subdivision 3, to the Court of Appeals from those parts of the decree entered in the office of the Clerk of the Surrogate's Court, New York County, on the 19th day of November, 1940, which are as follows:

"Ordered, Adjudged and Decreed, that all of the objections of said Marcel del Drago and Giovanni del Drago, individually, to the constitutionality of Section 124 of the Decedent Estate Law and to the equitable proration of the Federal Estate Tax on the estate of said decedent against the respective interests of all the beneficiaries named in the Will, be, and the same hereby are, overruled, and that no ground of unconstitutionality attaches to the provisions of Section 124 of the Decedent Estate Law nor to the method of the equitable apportionment of the Federal Estate Tax and New York Estate Tax pursuant to its terms;

. . . . . .

Ordered, Adjudged and Decreed, that the amount of the Federal and New York State estate taxes which may be paid by the executors be equitably prorated and apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law, and that such proration be included in the [fol. 6] decree to be entered on a subsequent accounting after such taxes have been fixed and paid;"

and to the extent that the supplemental decree entered in the office of the clerk of the Surrogate's Court, New York County, on the 24th day of December, 1940, confirms the foregoing quoted parts of the decree entered November 19, 1940, said Giovanni del Drago and Marcel del Drago, the aforesaid appellants, also appeal from so much of such supplemental decree, dated December 24, 1940, reading as follows:

"It is Ordered, Adjudged and Decreed that the decree heretofore entered herein on November 19, 1940, be and the same hereby is in all respects confirmed; and it is further

Ordered, Adjudged and Decreed that all of the terms and provisions of said decree shall be binding upon Clemente Francesco del Drago, an infant under the age of fourteen years with the same force and effect as if said infant had been a party to this proceeding at the date of the entry of said decree."

Dated, New York, January 17th, 1941.

Yours etc., Ludwig M. Wilson and Robert W. Maloney, Attorneys for Giovanni del Drago, Individually, Ludwig M. Wilson, Attorney for Marcel del Drago, Room 2404, 2 Lafayette Street, Borough of Manhattan, New York City.

[fol. 7] To: Clerk of the Surrogate's Court. Grant, Clark & Fox, Esqs., Attorneys for Petitioner Byron Clark, Jr., 270 Madison Avenue, New York City. Lawrason Riggs, Jr., Esq., Special Guardian, 120 Broadway, New York City. Harold W. Hastings, Esq., Special Guardian, 70 Pine Street, New York City. Laughlin, Gerard, Halpin & Graham, Esqs., Attorneys for Trustee, 40 Wall Street, New York City. Samuel R. Kurzman, Esq., Attorney for Guiseppe Vitagliano and Yorktown Building Corp., 505 Fifth Avenue, New York City.

[fol. 8] In Surrogate's Court, County of New York

Decree on Accounting, Dated November 19, 1940 Appealed From

Present: Honorable James A. Foley, Surrogate.

Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, deceased, who at the time of her death was a resident of the County and State of New York, having heretofore filed a petition, verified on the 31st day of January, 1940, praying that the account of their proceedings as such Executors be judicially settled, * * * and as to whether the Federal and New York Estate Taxes are to be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law; and a citation having been thereupon issued, pursuant to statute, directed to all persons interested in said estate, citing them to show cause before the said Surrogate, at his office in the County of New York, on the 15th day of March, 1940, at ten-thirty o'clock in the forenoon of that day, why the account of said Executors should not be judicially settled, and why the determination prayed for in said petition should not be had, and an order having been made herein directing that service of said citation be made upon such of the parties as may be non-residents of the State of New York; and the said citation having been returned with proof of the due service thereof on Frederick E. Grant, Paula Murray Coudert, Corn Exchange [fol. 9] Bank Trust Company, as Trustee under the Will of Josephine del Drago, deceased, Marcel del Drago, and on Francesco del Drago, Alessandro del Drago, Angela del

Drago (daughter of Clemente del Drago) Maria Milagros del Drago, Angela del Drago (daughter of Mario del Drago), infants over the age of fourteen years, and on Anna Maria del Drago, Maria del Drago, Ferdinando del Drago, Filippo del Drago and Giovanna del Drago, infants under the age of fourteen years, and on Lawrason Riggs, Jr., and Harold W. Hastings, the persons designated to receive said citation on behalf of said infants; and the Court having obtained jurisdiction of all necessary and proper parties to this proceeding;

And the said Executor, Giovanni del Drago, having appeared on the return day of said citation, by his attorney, Ludwig M. Wilson, and the said Executor, Byron Clark, Jr., having appeared by his attorneys, Grant, Clark & Fox, and the said Executors having rendered their account under oath before the said Surrogate; and the said account having been filed:

• • • • • • •

And Lawrason Riggs, Jr., having been appointed Special Guardian for Angela del Drago, an infant over the age of fourteen years, and Maria del Drago, Ferdinando del Drago, Filippo del Drago and Giovanna del Drago, infants under the age of fourteen years, all children of Mario del Drago, and the said Special Guardian having filed his report containing objections to the said account;

[fol. 10] And Harold W. Hastings having been appointed Special Guardian for Francesco del Drago, Alessandro del Drago, Angela del Drago and Maria del Drago, infants over the age of fourteen years, and Anna Maria del Drago, an infant under the age of fourteen years, all children of Clemente del Drago, and the said Special Guardian having filed his report containing objections to the said account;

And a hearing having been held before the said Surrogate on June 25th, 1940; and the Executors having filed an affidavit, verified July 8th, 1940 amending the said account, said affidavit having been served upon the attorneys for all of the parties appearing herein, and upon said Special Guardians, and having filed a supplemental account of their proceedings as such Executors covering the period from October 31st, 1939, through June 15, 1940, together with a supplemental petition, verified July 5th, 1940, praying that the said supplemental account be judicially settled, • • • and why the determination prayed for in said supplemental

petition should not be had, and the said supplemental citation having been returned with proof of the due service thereof upon all persons named in said supplemental citation;

* * * * * * *

And the affidavit of the Executor, Giovanni del Drago, sworn to the 14th day of October, 1940, from which it appears that Clemente Francesco del Drago, a necessary and proper party to this proceeding was born subsequent to the issuance of the citation and supplemental citation [fol. 11] herein having been filed herein on October 14th, 1940, and a supplemental citation having been thereupon issued directed to Clemente Francesco del Drago, citing him to show cause before the said Surrogate, at his office in the County of New York on the 3rd day of December, 1940, at ten-thirty o'clock in the forenoon of that day why the account and supplemental account of said Executors should not be judicially settled, and why the determination prayed for in said petition and in said supplemental petition should not be had, and an order having been entered in this Court on October 14th, 1940, designating said Harold W. Hastings to receive said supplemental citation on behalf of said Clemente Francesco del Drago, an infant under the age of fourteen years, and an order having been entered herein directing that service of said supplemental citation be made by publication;

And a further hearing having been held before the said Surrogate on October 14th, 1940, and the said Surrogate having heard the proofs and having rendered a decision in writing;

And it appearing that the decedent executed a will dated March 15th, 1933 in Paris, France, by which she disposed of all her property in that country to her husband, Giovanni del Drago, and that said will has been established in the Republic of France,

Now, on motion of Grant, Clark & Fox, attorneys for the petitioner, Byron Clark, Jr., it is further

[fol. 12] Ordered, adjudged and decreed, that the said will dated March 15th, 1933, executed by the decedent and established in the Republic of France, constituted a separate and independent disposition from the provisions contained in decedent's will admitted to probate in New York County, that the general clause of revocation of prior wills contained

in decedent's New York wills did not revoke nor in any manner affect the said French will, that the Executors are relieved from and are exempt from any responsibility for the administration of any assets of the decedent located in France, and that all of said assets, with the exception of a diamond tiara temporarily located in Paris, France, at the date of decedent's death, set forth in Schedules A and H of the account and specifically bequeathed to Paula Murray Coudert under the New York will, pass to Giovanni del Drago pursuant to the provisions of said French will;

And it further appearing that the decedent executed a will dated December 12th, 1931, in San Remo, Italy, by which she disposed of all of her property in that country to her husband, Giovanni del Drago, and that said will has been established in the Kingdom of Italy, it is further

Ordered, adjudged and decreed, that the said will dated December 12th, 1931, executed by the decedent and established in the Kingdom of Italy, constituted a separate and independent disposition from the provisions contained in decedent's will admitted to probate in New York County, [fol. 13] that the general clause of revocation of prior wills contained in decedent's New York wills did not revoke nor in any manner affect the said Italian will, that the Executors are relieved from and are exempt from any responsibility for the administration of any assets of the decedent located in Italy, and that all of said assets pass to Giovanni del Drago pursuant to the provisions of said Italian will; and it is further

* * * * * * *

Ordered, adjudged and decreed, that the amounts expended by the Executors for the improvement and rehabilitation of real property, as set forth in the account as amended by this decree, * * * be amortized by the Executors to December 31st, 1939, and by Corn Exchange Bank Trust Company, as Trustee * * * under the Ninth paragraph of the Will * * * from and after January 1st, 1940, * * * at the rate of five per cent (5%) per annum, * * *. and it is further

* * * * * * *

Ordered, adjudged and decreed, that the personal claim of the co-executor, Giovanni del Drago, to certain cash and currency, amounting to $10,339.23, located in the decedent's

safe deposit box at Fifth Avenue Safe Deposit Vaults, be, and the same hereby is, disallowed upon the merits, and that said cash and currency were the property of the decedent at the time of her death and constitute assets of her estate;

• • • • • • •

[fol. 14] Ordered, adjudged and decreed, that the account of the petitioners herein, as amended and supplemented, be, and the same hereby is, amended and modified in accordance with the determination of the Surrogate in the following particulars:

That Schedule A be amended—

(1) By including as an asset the following cash and currency:

• • • • • • •

$10,339.23

(2) By increasing the total of said Schedule from $1,213,682.28 to $1,224,021.51

• • • • • • •

That Schedule CC be amended —

• • • • • • •

(6) By correcting the recapitulation and totals of Schedule CC to read as follows:

[fol. 15] Recapitulation

	Total Cost	Amortization to 12/31/39	Cost Amortized to 12/31/39
411-413 Broadway	$3,542.00	$132.81	$3,409.19
258 East 112th St.	25,098.98	0.00	25,098.98
201 West 66th St.	23,919.27	211.42	23,707.85
23 Columbus Ave.	9,236.83	40.49	9,196.34
200 West 62nd St.	32,781.03	0.00	32,781.03
72 West 109th St.	24,441.61	221.91	24,219.70
	$119,019.72	$606.63	$118,413.09

• • • • • • •

And the said matter having been duly adjourned to this day, the said Surrogate, after having examined the said account and supplemental account, now here finds the state and condition of said account as so amended to be as stated and set forth in the following summary statement thereof to wit:

A summary statement of the account of Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, deceased, made by the Surrogate as judicially settled.

Principal Account

The said Executors are chargeable as follows:

With amount shown by Schedule A (Original capital of fund) [fol. 16]	$1,224,021.51	
With amount shown by Schedule A-1 (Increases on capital)	19,934.74	
Total principal charges		$1,243,956.25

The said Executors are credited as follows:

With amount shown by Schedule B (Realized decreases and losses on capital)	$30,857.89	
With amount shown by Schedule B-1 (Uncollectible items)	0.00	
With amount shown by Schedule C (Administration expenses actually paid)	376,149.64	
With amount shown by Schedule CC (Principal expended for improvement of real properties)	118,413.09	
With amount shown by Schedule E (Creditors' claims actually paid)	74,101.82	
With amount shown by Schedule F (Legacies or distributive shares actually paid)	379,982.88	
Total principal credits		979,505.32
Leaving on hand a balance of principal as shown by Schedule H		$264,450.93

[fol. 17] Income Account

The said Executors are chargeable as follows:

* * * * * * *

Combined Accounts

Principal remaining on hand	$264,450.93
Income remaining on hand	10,570.81
	$275,021.74

The foregoing principal balance of $264,450.93 consists of $127,541.51 in cash and $136,909.42 in other property on hand as of the 15th day of June, 1940.

The foregoing income balance of $10,570.81 consists entirely of cash on hand as of the 15th day of June, 1940.

And it appearing that the said Executors have fully accounted for all the monies and property of the Trust which have come into their hands as such Executors, and their account having been adjusted by the said Surrogate and a summary statement of the same having been made as above and herewith recorded, it is hereby

Ordered, adjudged and decreed, that the said account be, and the same hereby is, judicially settled; and it is further

* * * * * * *

Ordered, adjudged and decreed, that out of the balance so found, as above, remaining in the hands of the Executors [fol. 18] they retain the sum of $48,035.10 * * * for the commissions * * * and that they retain the sum of $115.60 for their disbursements * * * and it is further

Ordered, adjudged and decreed, that out of the cash balance of principal then remaining in the hands of the Executors they pay to Lawrason Riggs, Jr., Special Guardian * * * the sum of $7500, as and for his compensation * * * and that they pay to Harold W. Hastings, Special Guardian * * * the sum of $4000., as and for his compensation * * *

* * * * * * *

Ordered, adjudged and decreed, that out of the cash balance of principal then remaining in the hands of the Executors, the following amounts be paid to the counsel

* * * as and for their costs and disbursements * * * to wit:

To Robert W. Maloney * * * the sum of $1057.60.

To William J. Donovan and David Teitelbaum * * * the sum of $276.

To Laughlin, Gerard, Halpin & Graham, * * * the sum of $307.60.

To Samuel R. Kurzman, * * * the sum of $161.60.

And it is further Ordered, adjudged and decreed, that the claim of the co-executor, Giovanni del Drago, for reimbursement for funeral expenses and expenses incurred in the probate contest and in the administration of the [fol. 19] estate * * * be, and the same hereby is allowed in the reduced amount of $15,073.35, * * *

And it is further Ordered, adjudged and decreed, that out of the cash balance of principal then remaining in the hands of the Executors they pay to said Giovanni del Drago said sum of $15,073.35 in reimbursement for said expenses, after deducting therefrom the sum of $930.00, representing the amount of the surcharge hereinbefore directed against said Giovanni del Drago; and it is further

* * * * * * *

Ordered, adjudged and decreed, that the Executors be, and they hereby are authorized to expend out of principal a sum not to exceed $10,000 for the purchase of a cemetery lot, the erection of a permanent tomb and the perpetual care thereof, in San Remo, Italy, for the permanent interment of said decedent's remains;

And it appearing that a claim dated April 27th, 1940, was filed with the Executors by Guiseppe Vitagliano * * * and that an answer was filed herein by Yorktown Building Corp. setting forth its claim * * *

Ordered, adjudged and decreed, that the compromise of the claims of Guiseppe Vitagliano and Yorktown Building Corp. in the sum of $4,000 be, and the same hereby is, approved, and that * * * the Executors pay * * * the sum of $4,000 in full * * * settlement of any and all claims of said Guiseppe Vitagliano, Yorktown Building Corp. and Ashland Building Corp. * * * and that said payment be made out of principal and added to the cost [fol. 20] of rehabilitation of premises No. 72 West 109th Street, New York City, and that said amount be amor-

tized . . . at the rate of five per cent (5%) per annum, . . .

. . . . . .

And it appearing that Marcel del Drago and Giovanni del Drago, individually, have asserted that any apportionment of the Federal estate tax pursuant to the provisions of Section 124 of the Decedent Estate Law is violative of certain articles of the Federal and New York State constitution-; it is further

Ordered, adjudged and decreed, that all of the objections of said Marcel del Drago and Giovanni del Drago, individually, to the constitutionality of Section 124 of the Decedent Estate Law and to the equitable proration of the Federal Estate Tax on the estate of said decedent against the respective interests of all the beneficiaries named in the will, be, and the same hereby are, overruled, and that no ground of unconstitutionality attaches to the provisions of Section 124 of the Decedent Estate Law nor to the method of the equitable apportionment of the Federal Estate Tax and New York Estate Tax pursuant to its terms;

And it appearing that the will of decedent was executed on March 27th, 1934, and that said will contains no directions to the contrary, it is further

Ordered, adjudged and decreed, that the amount of the Federal and New York State estate taxes which may be paid by the Executors be equitably prorated and apportioned pursuant to the provisions of Section 124 of the [fol. 21] Decedent Estate Law, and that such proration be included in the decree to be entered on a subsequent accounting after such taxes have been fixed and paid;

And it is further Ordered, adjudged and decreed, that the balance of the principal then remaining in the hands of the Executors, consisting of cash in the sum of $51,454.06 and other property of an inventory value of $136,909.42, be held and administered by said Executors in accordance with the terms and provisions of the Will of said decedent, subject to a further accounting; and it is further

. . . . . .

Ordered, adjudged and decreed, that upon making the payments above directed to be made, and upon compliance with all matters in this decree mentioned, said Giovanni del Drago and Byron Clark, Jr., as Executors of the Last

Will and Testament of Josephine del Drago, deceased, be and they hereby are, discharged of and from all liability as to all matters embraced in said accounting and/or this decree, except as to the property remaining in the hands of said Executors; and it is further

Ordered, adjudged and decreed, that a supplemental confirmatory decree be entered herein after the service and return of the supplemental citation heretofore issued to Clemente Francesco del Drago, an infant under the age of fourteen years, and after the filing of a supplemental report by the Special Guardian for said infant.

James A. Foley, Surrógate.

[fol. 22] In Surrogate's Court, County of New York

Supplemental Decree on Accounting as to Additional Infant Party, Dated December 24, 1940 Appealed From

Present: Honorable James A. Foley, *Surrogate.*

Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, deceased, who at the time of her death was a resident of the County and State of New York, having heretofore filed a petition verified on the 31st day of January, 1940, praying that the account of their proceedings as such Executors be judicially settled, and that a determination be had as prayed for in said petition, and having thereafter filed a supplemental petition and account;

And it appearing that Clemente Francesco del Drago, a necessary and proper party to this proceeding, was born subsequent to the issuance of the citation and supplemental citation herein, and that a supplemental citation was issued herein, directed to said Clemente Francesco del Drago, citing him to show cause before the said Surrogate, at his office in the County of New York on the 3rd day of December, 1940, at ten-thirty o'clock in the forenoon of that day, why the account and supplemental account of said Executors should not be judicially settled, and why the determination prayed for in said petition and in said supplemental petition should not be had, and an order having been en-

[fol. 23] tered in this Court on October 14, 1940, designating

Harold W. Hastings to receive said supplemental citation on behalf of said Clemente Francesco del Drago;

And a decree having been entered herein on November 19, 1940, said decree providing that a supplemental confirmatory decree be entered herein after the service and return of the supplemental citation heretofore issued to Clemente Francesco del Drago, an infant under the age of fourteen years, and after the filing of a supplemental report by the Special Guardian for said infant;

And the said supplemental citation having been returned with proof of the due service thereof on Clemente Francesco del Drago, an infant under the age of fourteen years, and on Harold W. Hastings, the person designated to receive said supplemental citation on behalf of said infant;

And Harold W. Hastings having been appointed Special Guardian for said Clemente Francesco del Drago, an infant under the age of fourteen years, and the said Special Guardian having filed his report wherein he finds said proceedings correct insofar as they affect the interests of his ward;

It is ordered, adjudged and decreed that the decree heretofore entered herein on November 19, 1940, be and the same hereby is in all respects confirmed; and it is further

Ordered, Adjudged and decreed that all of the terms and provisions of said decree shall be binding upon Clemente [fol. 24] Francesco del Drago, an infant under the age of fourteen years with the same force and effect as if said infant had been a party to this proceeding at the date of the entry of said decree.

James A. Foley, Surrogate.

[fol. 25] In Surrogate's Court, County of New York

Petition for a Voluntary Accounting

To the Surrogate's Court of the County of New York:

The petition of Giovanni del Drago, residing at 270 Park Avenue, Borough of Manhattan, New York City, and Byron Clark, Jr., residing at Stratford and Haviland Roads, Harrison, New York, respectfully states:

That said decedent died on October 8th, 1937.

That Letters Testamentary under the Last Will and Testament of Josephine del Drago, deceased, who at the time of her death was a resident of New York County, were granted to your petitioners by the Surrogate's Court of New York County, New York, on the 6th day of April, 1938.

* * * * * * *

That the names and post-office addresses of * * * the husband of the decedent, of all trustees under the Will of decedent, of all legatees, of all assignees * * * and of all other necessary and proper parties, are as follows:

Giovanni del Drago, husband of the decedent, one of the petitioners, residing at No. 270 Park Avenue, New York City. Specific legacy (Sixth paragraph)—Seven thousand two hundred eleven ($7,211.) Dollars and legacy of Three Hundred Thousand ($300,000.) Dollars (Seventh para- [fol. 26] graph). Life estate in residue (Ninth paragraph). —value unknown.

Marcel del Drago, no relationship, Palazzo Colonna, Piazza S. S. Apostoli, Rome, Italy. Life estate in trust of Two Hundred Thousand ($200,000.) Dollars (Eighth paragraph).

Paula Murray Coudert, granddaughter of the decedent, residing at Oyster Bay, Nassau County, New York. Specific bequest of diamond tiara (Fifth paragraph).

Frederick E. Grant, no relationship, residing at Oakdene, Bernardsville, New Jersey. Legacy of Twenty-five Hundred ($2500.) Dollars (Fourth paragraph).

Corn Exchange Bank Trust Company, 13 William Street, New York City, Trustee of Two Hundred Thousand ($200,000.) Dollars trust (Eighth paragraph) and Trustee of trust of residue (Ninth paragraph)—value unknown.

The following are the only children of Clemente del Drago: Francesco del Drago, Via B. Oriani 28, Rome, Italy. * * * Alessandro del Drago, Via B. Oriani 28, Rome, Italy. * * * Angela del Drago, Via B. Oriani 28, Rome, Italy. * * * Maria Milagros del Drago, Via B. Oriani 28, Rome, Italy. * * * Anna Maria del Drago, Via B. Oriani 28, Rome, Italy. Contingent remainder interest in trust under Eighth paragraph.

No children of said Clemente del Drago are deceased.

The following are the only children of Mario del Drago: Angela del Drago, Via Del Monte Delle Gioie 12, Rome, Italy. * * * Maria del Drago, Via Del Monte Delle

Gioie 12, Rome, Italy. * * * Ferdinando del Drago, Via Del Monte Delle Gioie 12, Rome, Italy. * * * [fol. 27] Filippo del Drago, Via Del Monte Delle Gioie 12, Rome, Italy. * * * Giovanna del Drago, Via Del Monte Delle Gioie 12, Rome, Italy. Contingent remainder interest in trust under Ninth paragraph.

No children of said Mario del Drago are deceased.

All of said persons are of full age and sound mind except the said Francesco del Drago, Alessandro del Drago, Angela del Drago (daughter of Clemente del Drago), Maria Milagros del Drago and Angela del Drago (daughter of Mario del Drago), who are infants over the age of fourteen years, and the said Anna Maria del Drago, Maria del Drago, Ferdinando del Drago, Filippo del Drago and Giovanna del Drago, who are infants under the age of fourteen years. Said infants reside with their respective fathers named above at the addresses hereinabove set forth." They have no general or testamentary guardians.

Marcel del Drago has no children or issue.

* * * * * * *

That as stated in Schedule J of said account the Federal and New York Estate Taxes have not been finally assessed and paid by the Executors. That the returns have been filed and partial payments on account of the taxes have been made by the Executors. That the audit of these returns cannot be completed until certain of the questions raised in this petition have been determined. That accordingly, several months may elapse before the Estate Taxes are finally fixed and determined.

That in the meantime, the Executors deem it advisable to make a partial distribution to the Trustee of the resid- [fol. 28] uary trust under the Will, but it is impossible to partially set up this Trust in the absence of a determination as to whether or not there must be an apportionment of the Estate Taxes as provided in Section 124 of the Decedent Estate Law. That accordingly, the Executors request a determination as to whether or not the Federal and New York Estate Taxes paid and to be paid must be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law.

* * * * * * *

That the execution of this petition by the petitioner, Giovanni del Drago, shall not be deemed a waiver of any of his individual claims, rights or remedies, and is made without prejudice thereto.

That your petitioners are desirous of rendering to said Surrogate's Court an account of their proceedings, and therefore pray that their account be judicially settled, and * * * as to whether the Federal and New York Estate Taxes are to be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law * * * and for such other and further relief as the Court may deem just and proper, and that an order be granted according to law directing the service of the citation personally without the State or by publication upon the persons hereinbefore stated to be non-residents of the State or otherwise.

(Verified by Giovanni del Drago and Byron Clark, Jr., Petitioners, dated January 31, 1940.)

[fol. 29] In Surrogate's Court, County of New York

Account of Executors Proceedings

To the Surrogate's Court of the County of New York:

The undersigned, Giovanni del Drago and Byron Clark, Jr., do render the following account of their proceedings as Executors of the Last Will and Testament of Josephine del Drago, deceased, from the 8th day of October, 1937, to the 31st day of October, 1939. On the 6th day of April, 1938, Letters Testamentary were issued to Giovanni del Drago and Byron Clark, Jr.

Deceased died a resident of New York County on the 8th day of October, 1937.

* * * * * * *

Summary

The following is a summary statement of their account (as corrected by a supplemental account covering period October 31, 1939 to June 15, 1940):

Principal Account

Charges:		
Sched. A (Orig. capital)	$1,213,682.28	
Sched. A-1 (increases)	19,934.74	
Total		$1,233,617.02
[fol. 30] Credits:		
Sched. B. (decreases and losses)	$30,857.89	
Sched. B-1 (Uncollectible items)	0.00	
Sched. C (Administration expenses actually paid)	377,079.64	
Sched. CC (Expenditure to improve real properties)	118,417.30	
Sched. E (creditors claims actually paid)	74,101.82	
Sched. F (Legacies or distributive shares actually paid)	379,982.88	
Total		980,439.53
Sched. H. Principal bal. on hand		$253,177.49

[fol. 31] Income Account

Charges:		
Sched. A-2 (total income)	$111,399.18	$111,399.18
Credits:		
Sched. C-2 (Payments for administration and maintenance)	53,328.31	
Sched. F-1 (Distribution of income to beneficiaries)	47,495.85	
Total		$100,824.16
Sched. H-1 (Undistributed income)		$ 10,575.02

Combined Accounts

Principal on hand	$253,177.49
Income on hand	10,575.02
	$263,752.51

The foregoing principal balance of $253,177.49 consists of $117,198.07 in cash and $135,979.42 in other property on hand as of the 15th day of June 1940. It is subject to deduction of estimated commissions amounting to $43,407.60 shown in Schedule K., and to the proper charge to principal of the expense of this accounting.

• • • • • • • •

The attached schedules which are severally signed by them, are part of this account.

Giovanni del Drago, Bryon Clark, Jr., Accountants.

[fol. 32] Schedule A. (An itemized enumeration of the stocks and bonds, mortgages, cash, and other miscellaneous personal property, comprising the total of $1,214,098.78.)

Schedule A-1. (An itemized enumeration of the increases derived from capital assets.)

Schedule B. (An itemized enumeration of all decreases in capital assets.)

Schedule B-1. (Uncollectible items; none found for inclusion herein.)

Schedule C. (An itemized enumeration of moneys paid by the executors for administration, funeral and other necessary expenses, including the following:

1938:

Apr. 7	State Tax Comm., payment on account of New York Estate Tax	$ 70,000.00

• • • • • • •

1939:

Jan. 5	Collector of Internal Revenue Federal Estate Tax	225,000.00
Apr. 6	Federal Estate Tax	4,726.21

Schedule CC. (An itemized enumeration of expenditures to improve real property in the aggregate of $118,417.30 as shown in supplemental account.)

[fol. 33] Schedule C-1. (An itemized enumeration of unpaid claims for administration, funeral and other expenses follows.)

Schedule D. (Claims presented by creditors, of which there were none, except those set forth in Schedule E.)

Schedule D-1. (Judgments or decrees rendered—none.)

Schedule D-2; D-3. (No claims were found for inclusion.)

Schedule E. (An itemized enumeration of all claims paid by the executors including the following):

1939

Jan. 24	Paula M. Coudert, settlement of claim pursuant to compromise agreement	$59,750
	Frederic R. Coudert, Jr., as Successor trustee under Will of Pauline S. Murray pursuant to compromise agreement	250

Schedule F. (An itemized enumeration of payments by the executors out of capital to devisees, legatees, etc., including the following):

To Giovanni del Drago on account of legacy under Seventh Paragraph of Will.

[fol. 34] 1938:

April 20	25,000	
May 19	50,000	
July 7	40,000	
" 29	35,000	
Nov. 10	70,000	
		$220,000

To Corn Exchange Bank Trust Company as trustee of the trust for the benefit of Marcel del Drago and remainder-men under the Eighth Paragraph of the Will:

6-23-38	Cash		$50,000.00	
6-30-38	Securities:			
	$6000 A. T. & T. Deb., 5½% at 112⅞	$6,772.50		
	3000 New Am. Gas 5% at 116	3,480.00		
	10000 Cin. U. T. Co. at 108¾	10,875.00		
	10000 P. R. R. at 94¼	9,425.00		
	6000 Kingdom of Norway at 106	6,360.00		
	75 S. O. at 53⅛	3,984.38		
	200 A. T. & T. at 143⅛	28,625.00		
			69,521.88	
10-31-38	Cash		28,000.00	
				$147,521.88
7-19-38	To Giovanni del Drago jewelry			7,211.00

[fol. 35] Schedule G. (An itemized enumeration of assets, fully liquidated without increase or decrease, follows.)

Schedule H. (An itemized enumeration of cash, securities and other personal property, constituting capital remaining in the executors hands follows.)

Schedule A-2. (An itemized enumeration of income received by the accountants follows.)

Schedule C-2. (An itemized enumeration of expenditures for administration chargeable to income, including the payment of taxes on the following real estate.)

1939:

Apr. 25 City Collector, Real Estate taxes for period 1-1-39 to 6-30-39

Location	*Assessed Valuation*	*Taxes*	
283-5 Greenwich St.	$35,000	$507.50	
64-66 Lispenard St.	31,000	449.50	
413 Broadway	80,000	1,160.00	
411 Broadway	49,000	710.50	
23 Columbus Ave.	40,000	580.00	
54 Amsterdam Ave.	43,500	630.75	
140 Amsterdam Ave.	50,000	725.00	
1121 Second Ave.	67,000	971.50	
2173-75 Second Ave.	18,000	261.00	
995 Columbus Ave.	43,000	623.50	6,619.25

[fol. 36] Schedule F-1. (An itemized enumeration of payments out of income to devisees, legatees, trustees, etc., follows.)

Schedule H-1. (An itemized statement of undistributed income follows.)

Schedule I. (An enumeration of the names and addresses of the various legatees and other persons entitled to take under the Will.)

Schedule J

A statement of all estate taxes assessed and paid by them upon or in respect of any property required to be included in the gross estate of the decedent under the provisions of the Tax Law or under the provisions of any United States Revenue Act.

The Federal and New York Estate Taxes have not been finally fixed and determined. The returns have been filed but their examination and audit has not been completed. Upon the determination of the various questions raised in this proceeding, the Executors will be able to complete the estate tax proceedings.

The following payments have been made on account of the Federal and New York Estate taxes, to wit:

[fol. 37]

	New York Estate Tax		
1938: Apr. 7	State Tax Commission		$ 70,000.00
	Federal Estate Tax		
1939: Jan. 5	Coll. of Internal Revenue	$225,000.00	
Apr. 6	Coll. of Internal Revenue	4,726.21	229,726.21
			$299,726.21

As set forth in Schedule "L" of the account, the Executors request a determination of the question of whether the Federal and New York Estate Taxes are properly to be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law.

Schedule K. (An itemized computation of commissions due upon the accounting.)

Schedule L. (A statement of all other matters affecting the administration of said estate or fund and the rights of those interested therein, including the same allegations, pertaining to the apportionment of Estate Taxes, as those in the executors petition, pages 27 and 28 of this record.)

[fol. 38] In Surrogate's Court, County of New York

Answer of Giovanni del Drago

Giovanni Del Drago, individually, answering the petition of the petitioners herein by Robert W. Maloney, his attorney, respectfully shows to the Court and alleges:

* * * * * * *

Third: In respect to the apportionment of the Federal and New York Estate Taxes under Section 124 of the Decedent's Estate Law.

This respondent respectfully objects to the apportionment and assessment against him personally of any portion

of the Federal Estate Tax heretofore or hereafter paid by the executors of said decedent's estate, and objects to any deduction therefor from any legacy or interest which he may have or may receive under decedent's will as prayed for in the petition herein, pursuant to Chapter 709 of the laws of 1930 as amended, and known as Section 124 of the Decedent's Estate Act and to Chapter 710 of the laws of 1930 as amended, known as Chapter 249T of the Tax law, and further objects to the entry of any order or decree herein made by the Surrogate pursuant to said statutes or either of them directing any apportionment or proration of the said Federal Estate Tax or any portion thereof against this respondent, or any legacy or interest which he may receive, upon the ground that said Chapters 709 and 710 of the laws of 1930 as amended are unconstitutional and void and are violative of Article VI of the Constitution of the United States; Article I, Sections 8 and 9 of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United [fol. 39] States, and are further violative of Article I, Section 1, Article I, Section 11, and Article III, Section 22, of the Constitution of the State of New York, and are in conflict with and in violation of the provisions of the Federal Estate Tax Law, being Title III of the Revenue Acts of 1926 and 1932 as amended by the Revenue Acts of 1934, 1935, 1936, and 1938, and as amended known as Section 826-B of the United States Internal Revenue Code in the following respects:

1. Chapter 709 and Chapter 710 of the laws of 1930 as amended are unconstitutional and void in that they confer, or attempt to confer, upon the Surrogate or upon the Surrogate's Court, powers and duties the exercise of which by the Surrogate or by the Surrogate's Court is unauthorized by and repugnant to the Constitution of the United States insofar as such chapters purport to vary, change, supplement or modify the method and burden of taxation arising out of the devolution of the property of the decedent upon her death under the provisions of the United States Revenue Act as amended, and insofar as said chapters purport to impose, extend, assess, or prorate the payment of the said Federal Estate Tax or any portion thereof upon or against this respondent, or upon the legacy or benefit to him given under decedent's will, or to burden or charge

the legacy or benefit to him given under decedent's will with the payment of or any contribution to the said Federal Estate Tax or any part thereof.

2. That Chapters 709 and 710 of the laws of 1930 as amended are unconstitutional and void insofar as said chapters impose or assess, or attempt to impose or assess [fol. 40] against this respondent, by any order or decree of the Surrogate or of the Surrogate's Court, any portion of the Federal Estate Tax heretofore or hereafter levied against the estate of the decedent, or to deduct or to attempt to deduct any portion of the said Federal Estate Tax from any legacy or benefit which this respondent has received or may receive under the decedent's will, in that:

(a). That said statutes purport or attempt to change, alter, modify or apportion a tax imposed under a statute of the United States regularly and duly enacted by the Congress of the United States pursuant to the Federal Constitution, to wit, the Federal Estate Tax Law.

(b). Said statutes abridge, amend, modify, or attempt to abridge, amend or modify the said federal statute, to wit, Title III of the Acts of 1926 and 1932 as amended, insofar as such Acts apply to citizens of the State of New York, and destroy the uniformity of operation of the said Federal Estate Tax Law throughout the United States.

(c). That the Legislature of the State of New York had no power to enact legislation, to wit, Chapters 709 and 710 of the laws of 1930 as amended, the effect of which statutes was to amend, modify and change laws duly enacted by the Congress of the United States and known as Title III of the Revenue Acts of 1926 and 1932 as amended.

(d). That the Legislature of the State of New York had [fol. 41] no power or authority to change, modify, amend or alter a tax or the method of collection of a tax duly imposed by the Congress of the United States and to apportion the said tax between persons not primarily liable therefor under the said Federal Revenue Acts.

(e). That Section 314-B of the United States Revenue Act of 1926 as amended, now being Section 826-B of the United States Internal Revenue Code, has been adopted by the Congress of the United States and is the supreme

law of the land as defined by the Constitution of the United States, and that Chapters 709 and 710 of the laws of 1930 as amended, conflict with the said federal statutes and are void and of no effect.

3. That Chapters 709 and 710 of the laws of 1930 as amended are unconstitutional and void insofar as said statutes delegate or attempt to delegate to a judicial officer of the State of New York, to wit, the Surrogate, power and authority to modify, change, alter or allocate a tax imposed by a statute of the United States duly adopted, to wit, the Federal Estate Tax Law hereinabove mentioned.

4. That Chapters 709 and 710 of the laws of 1930 are unconstitutional and void in that any allocation of the Federal Estate Tax made by the Surrogate pursuant to said act against any legacy or benefit of this respondent, or any deduction from the full amount of the legacy and benefit which this respondent may receive, deprives, or attempts to deprive this respondent of property, to wit, [fol. 42] the legacy and benefit, or a portion of the legacy and benefit to him given under the decedent's will, and diminishes the same without due process of law and takes from this respondent property, to wit, a portion of his legacy or benefit under the decedent's will without just compensation, and denies to this respondent the equal protection of the laws.

5. That Chapters 709 and 710 of the laws of 1930 as amended are unconstitutional and void in that said statutes confer, or attempt to confer, upon a judicial officer of the State of New York, to wit, the surrogate, powers and duties in respect to taxes imposed by the Congress of the United States, and gives and grants to the said Surrogate, in his discretion, power and authority to modify, change, and alter the tax so imposed by Congress under the Federal Estate Tax Law the exercise of which power under the said statutes by the Surrogate, is unauthorized by and repugnant to the Constitution of the United States and of the State of New York, and to the Federal Estate Tax Law.

6. That Title III of the United States Revenue Acts of 1926 and 1932, as amended, imposes a tax upon the transfer of the net estate of the deceased passing, based upon the value thereof. That the said tax is laid upon the prin-

ciple that death is the generating source from which the authority to impose such tax lies, and that the tax imposed under such statute is levied upon the power to transmit by reason of the passing of the property on the death of the property owner; that Chapters 709 and 710 of the laws of 1930 change, or attempt to change the nature and char-
[fol. 43] acter of the tax imposed by the federal statutes above set forth, and to change and modify the source of payment of the said tax in that said Chapters 709 and 710 of the laws of 1930 as amended transfer the taxable obligation due from the decedent's estate to the United States Government to the individual beneficiaries named in decedent's will, and to assess against said individual beneficiaries, or their respective legacies or interests, a direct tax to be fixed by the Surrogate, in his discretion, under the decree to be made herein, and that the Legislature of the State of New York did not and does not possess the power to change the nature and character of the said tax imposed by the Government of the United States, or the obligation for the payment thereof.

* * * * * * *

Wherefore, this respondent respectfully prays:

* * * * * * *

III. That no portion of the Federal Estate Tax be allocated or apportioned between and among the several beneficiaries and that Chapters 709 and 710 of the laws of 1930 as amended, insofar as said statutes attempt to regulate, apportion or allocate any portion of the Federal Estate Tax against any individual or any individuals legacy or benefit, be declared unconstitutional and void.

IV. That the respondent may have such other, further and different relief as may be just, equitable and proper in the premises.

Giovanni del Drago, Individually.

[fol. 44] In Surrogate's Court, County of New York

Answer and Objections of Marcel del Drago

Marcel del Drago, a person interested in the above entitled proceeding as a beneficiary of a trust provided in

the Will of said Josephine del Drago, by William J. Donovan and David Teitelbaum, his attorneys, answering the petition for a voluntary accounting by Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, deceased, heretofore filed in this Court, and making objections to said accounting, respectfully shows to this court and alleges:

First: This court has no power to determine that the Federal estate taxes paid and to be paid by the estate of the above named decedent shall be apportioned pursuant to the provisions of section 124 of the decedent estate law inasmuch as the provisions of said section 124 requiring the apportionment of Federal estate taxes, as applied to the estate of the above named decedent are invalid because they are inconsistent with the provisions of the Federal Revenue Acts which are paramount and controlling. The Federal Revenue Acts provide in substance that Federal estate taxes shall be a general charge against the estate of decedents and shall be entirely borne by the residue rather than be apportioned unless otherwise directed by the Will of the decedent. The Will of the above named decedent does not otherwise direct.

[fol. 45] Second: This respondent objects to Schedule "J", Schedule "L", and to the whole of said account for the reason that it does not provide for the charging of all Federal estate taxes paid and to be paid by the estate against the residue of the estate of the Testatrix. The ground for this objection is the same as that set forth in paragraph First hereof.

Third: This respondent objects to Schedule "J", Schedule "L", and to the whole of said account for the reason that it does not provide for the charging of all Federal and New York estate taxes paid and to be paid by the estate against the residue of the estate of the Testatrix on the ground that, as this respondent's attorneys are informed and believe, it was the intention of the Testatrix to have all of said estate taxes paid out of her residuary estate.

Fourth: This respondent reserves the right to reply to any matters affecting him which may be alleged or pleaded in the answer, objections, or reports of any of the other respondents herein.

Wherefore this respondent respectfully prays:

(1) That this court order and decree that all the Federal estate taxes paid and to be paid by the estate of the above named decedent be charged against the residue thereof and that no part of said Federal estate taxes be apportioned to or deducted from the trust fund of $200,000 for the benefit of this respondent and certain remaindermen provided for in paragraph "Eighth" of the Will of the above named decedent: and

[fol. 46] (2) That this Court order and decree that all Federal and New York estate taxes paid and to be paid by the estate of the above named decedent be charged against the residue thereof and that no part of said Federal and New York estate taxes be apportioned to or deducted from the trust fund of $200,000 for the benefit of this respondent and certain remaindermen provided for in paragraph "Eighth" of the Will of the above named decedent.

[fol. 47] In Surrogate's Court, County of New York

Report of Harold W. Hastings, Special Guardian of Infant Remainderman Under 8th Paragraph of Will

I, Harold W. Hastings, * * * having been duly appointed as Special Guardian of children of Clemente del Drago, Francesco del Drago, Alessandro del Drago, Angelo del Drago, Maria Milagros del Drago, Anna Maria del Drago * * * I have carefully examined the account of this proceeding together with all the papers relating thereto.

I respectfully submit my findings consequent upon such examination as follows:

All of the above infants are over the age of 14 years, except Anna Maria del Drago, who is under the age of 14 years. All of the said infants are Italian born and reside in Italy.

* * * * * * *

In this proceeding, the executors ask for a construction of the said Will and for certain instructions.

* * * * * * *

In addition thereto, the executors request a determination as to whether or not the Federal and New York Estate Tax paid and to be paid must be apportioned, pursuant to the provision, Section 124 of the Decedent Estate Law.

Interest of Infants

By Article Eighth of the decedent's Will, the trust of $200,000 was created for the benefit of Marcel del Drago, [fol. 48] with the remainder to the lawful children of the said Marcel del Drago. In the event of Marcel del Drago's death without issue, the said article provides that the said infants, children of Clemente del Drago, Francesco del Drago, Alessandro del Drago, Angela del Drago, Maria Milagros del Drago, Anna Maria del Drago, are to receive the said fund. The said Marcel del Drago is now living and has no children.

* * * In Paragraph Eighth which is the paragraph creating the trust in which the infants I represent are interested, the testator named the Corn Exchange Bank Trust Company, as trustee. Incidentally, the Corn Exchange Bank Trust Company is the trustee of the residuary Estate in which the infants I represent have no interest.

In addition to the principal assets of the estate set forth in Schedule A of the value of $1,214,098.78, the estate has real estate of a value of more than $221,000 and certain property alleged to be in France and Italy, not specified in this accounting.

I find that in accordance with the discretionary powers vested in them, the executors sold most of the securities. The balance was delivered to the Corn Exchange Bank Trust Company, as trustee, under Paragraph Eighth of the Will. The real estate remains in the residuary estate.

* * * * * * *

The determination of the various requests for instructions and construction requested in the petition of the accounting parties do not affect the interests of my wards except that on the petition for an apportionment of the Estate taxes.

[fol. 49] Giovanni del Drago, individually, has filed what is called an answer to the petition and under the heading "Third" therein objects on various grounds to the apportionment and assessment against him personally of any portion of the Federal Estate Tax.

Since no tax has been apportioned as yet, I do not see how my wards can formally object, but it is, of course, of vital interest to them to have the taxes allocated to the trust in paragraph Eighth made as small as possible.

For that purpose, and to preserve the rights of my wards in the event that it be held that the Federal tax is not to be apportioned but must be a charge against the residuary estate, I join in the prayer of Giovanni del Drago, individually, that no part of the said Federal tax be apportioned or allocated against any individual legacy or benefit and that the same be charged against the residuary estate only.

Conclusions and Recommendations

I conclude that the interests of my wards have been fully protected and recommend that so far as they are concerned, the account be allowed and settled as filed. However, I would like to be heard on their behalf on the question of the apportionment of the Federal Taxes.

Dated, New York, April 16, 1940.

Harold W. Hastings, Special Guardian.

[fol. 50] In Surrogate's Court, County of New York

Report and Objections of Lawrason Riggs, Special Guardian of Infant Remaindermen Under 9th Paragraph of Will

To the Surrogate's Court of the County of New York:

I, Lawrason Riggs, Jr. having been appointed by this Court and having duly qualified as Special Guardian to represent and protect the interests of Angela del Drago, an infant over the age of fourteen years, Maria del Drago, Ferdinando del Drago, Filippo del Drago and Giovanna del Drago, infants under the age of fourteen years, all children of Mario del Drago, respectfully report as follows:

* * * * * * *

6. The said Last Will and Testament of the decedent Josephine del Drago dated March 27th, 1934, was, after the settlement of a contest, duly admitted to probate by a Decree dated April 6, 1938, resettled on the 25th day of April, 1938, and letters testamentary were issued thereon

to Giovanni del Drago and Byron Clark, Jr. the accounting Executors herein, on April 6, 1938. Pursuant to the agreement of settlement and to the Decree above mentioned $59,750 was paid to Paula M. Coudert and $250 to F. R. Coudert Jr. as Successor Trustee of the Estate of Paula Murray, or a total of $60,000 for the settlement of the case, all out of the residuary estate.

7. The infants for whom I am acting have the remainder interest in the trust of the residuary estate pursuant to the [fol. 51] Ninth article of the Will of said decedent, which reads as follows:

"Ninth: All the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and including any and all property over which I have power of appointment, and including all lapsed legacies, I give, devise and bequeath to the Corn Exchange Bank Trust Company, 13 William Street, Borough of Manhattan, City, County and State of New York, In Trust, however, to invest the same and collect the rents, issues and profits therefrom and to apply the same for the use, maintenance and support of my beloved husband Giovanni del Drago of Rome, Kingdom of Italy, if he shall survive me, during the term of his life, and upon his death, or at my death if he shall have predeceased me, I direct my trustee and/or executors, as the case may be, to pay over the principal of said estate in equal shares *per stirpes* to the children born in lawful wedlock of Mario del Drago, second son of Luigi del Drago, of Rome, Italy, a brother of my husband, and/or the children born in lawful wedlock of any such child which may then be deceased, to be theirs absolutely and forever."

8. This is a proceeding to settle the accounts of the petitioning Executors up to October 31, 1939, and for a construction of the decedent's Will and for instructions on [fol. 52] various points that are raised in the petition and which are hereinafter referred to in more detail.

* * * * * * *

12. (a) Mr. Giovanni del Drago, one of the accounting Executors herein, is the surviving spouse of the decedent Josephine del Drago. Under her Will, he receives a bequest of $300,000.00 and her personal effects, together with

the income for life of the residuary trust under article Ninth of the Will. Mr. Giovanni del Drago is the great uncle of the infants for whom I have been appointed Guardian herein and who are the remaindermen of the residuary trust.

(b) There is also a trust under the eighth article of this Will of $200,000. for the life benefit of Marcel del Drago with remainder to his issue and in default of issue to the children of Clemente del Drago. My wards have a contingent interest in the remainder of this trust in the event that all prior remainders fail.

Objections and Comments

* * * * * * *

VI. Apportionment of Estate Taxes

(a) The petitioners have failed to include a schedule apportioning the Federal and New York Estate Taxes as required by §124 of the Decedent Estate Law but have requested a determination as to whether or not such apportionment should be made.

(b) Decedent's Will contains no provision specifically mentioning the payment of New York and Federal Estate [fol. 53] taxes and contains no provision whatever concerning the payment of charges against the estate except the usual provision for the payment of debts and funeral expenses. This provision is as follows:

"First: I direct my executors hereinafter named to pay all my just debts and funeral expenses as soon after my death as is practical."

(c) The account shows that a payment has been made on account of the New York Estate Tax in the sum of $70,000.00 and a payment of $229,726.21 for Federal Estate Tax. The account states that both of these amounts are subject to final determination.

(d) The Special Guardian objects to the failure of the petitioners to include a schedule apportioning the taxes and takes the position that the tax items already paid and the amounts of the taxes as finally determined must be apportioned as provided by law on the ground that there is no provision in the Will that purports to vary the statutory

formula. This point is of overwhelming importance to my wards since the amount of the taxes already paid would, if charged to the residue of the estate together with the commissions and all other items properly to be paid out of the residue consume entirely the cash and securities of $276,435.77 and even a part of the real estate, described in Schedule "L". This would leave only the residue of the real estate without any cash to go into the residuary trust.

Lawrason Riggs, Jr., Special Guardian.

[fol. 54] In Surrogate's Court, County of New York

Statement of Evidence

Hall of Records, New York, N. Y.,
October 14, 1940.

Before: Hon. James A. Foley, Surrogate

Appearances:

Grant, Clark & Fox, Esqs., (Littleton Fox, Esq., of Counsel), For Petitioner, Byron Clark, Jr.

Ludwig M. Wilson, Esq., For Petitioner, Giovanni del Drago.

Laughlin, Gerard, Bowers & Halpin, Esqs., (Miss Alice G. Baldridge, of Counsel), For the Trustee, Corn Exchange Bank Trust Company.

Robert W. Maloney, Esq., for Giovanni del Drago, individually.

Donovan, Leisure, Newton & Lombard, Esqs., (David Teitelbaum, Esq., and Guy Martin, Esq., of Counsel), For Objectant, Marcel del Drago.

Lawrason Riggs, Jr., Esq., and Frederick E. Mygatt, Jr., Esq., of Counsel, Special Guardian.

Harold W. Hastings, Esq., Special Guardian.

[fol. 55] Excerpt from Stenographer's Minutes

Mr. Maloney: The only other question, if your Honor please, is the question of the apportionment of the inheritance taxes between and among the several legatees. As your Honor realizes, Mr. del Drago receives a large legacy and a life estate in a——

The Surrogate: What is difficult about that?

Mr. Maloney: The only question here is that we are challenging Section 124 and we are raising constitutional questions.

The Surrogate: You can save that for the United States Supreme Court. They passed on it once.

Mr. Maloney: I thought that your Honor had strong opinions on it, but we have raised this question which I do not think has been directly presented to you in this manner. We have separated the Federal estate tax from the State. We raise no question about the State. They can lay and assess their taxes the way they please, but we do say that as far as the Federal taxes go, under the law and under the Constitution, that the Federal law is the supreme law of the land, and that the right of the Legislature to delegate this to the Surrogate and to anybody else is beyond its power and that it is in conflict with the Federal cases.

The Surrogate: Do you not know that the Federal courts were the first ones to exercise this rule of equity and that the New York courts refused to follow it?

Mr. Maloney: You mean Judge Hough's decision over here in that celebrated case? I do not think it was before them. It was a purely arbitrary rule, and it was obiter that he threw in there.

[fol. 56] The Surrogate: He said the State could provide for the division.

Mr. Maloney: The State could settle the controversy or the controversy could be settled in the State courts.

The Surrogate: That same question was raised in a case that went to the United States Supreme Court from Judge Delehanty.

Mr. Maloney: I do not think it was raised. They joined the two and they did not raise this question nor did they raise it on the equal fixation of tax upon all concerned in all states, so we will submit, if your Honor pleases, and ask a ruling.

The Surrogate: Let the record show that you have raised the question and that I overrule it; that you have raised the Federal question and the Federal Constitution as to jurisdiction and violation of the Federal Constitution and any other ground such as lack of power in this Court.

Mr. Maloney: It is set forth in the answer of Mr. del Drago as an individual. I would ask a specific ruling, if

your Honor pleases, that the objections raised as to the constitutionality of the statute, the right of the Legislature to enact the statute and the power delegated to the Surrogate's Court, that all such objections are set forth in the answer of Giovanni del Drago individually are overruled as a matter of law. Does your Honor so rule?

The Surrogate: I so hold under the authority of Matter of Scott, 158 Misc., 481, affd. 249 App. Div. 542; affd. 274 N. Y. 538; certiorari denied at 302 U. S. 721.

Mr. Maloney: On the question of uniformity of law, that question is, of course, as to the effect of the transportation [fol. 57] of the tax and placing it upon other shoulders than that contemplated by the Federal Act.

The Surrogate: I understand the point you are making. It is not necessary to develop it. Every Federal constitutional question that you raised is overruled.

Mr. Wilson: Can we not possibly have a separate decree which would give us a chance to make a direct appeal to the Court of Appeals and avoid the Appellate Division?

The Surrogate: No, there is no way of doing that. I do not think the Court of Appeals would let you hurdle the Appellate Division.

Mr. Maloney: Mr. Wilson helped me and I have written a brief that I would like to submit to your Honor and Mr. Donovan's office has sent one down.

. . . . . .

The Surrogate: I direct the apportionment of both the Federal and State tax pursuant to Section 124 of the Decedent Estate Law.

[fol. 58] PART OF CLAIMANT'S EXHIBIT 1

(Letter of Morgan J. O'Brien)

New York, January 17, 1938.

Count Giovanni del Drago, Hotel Gladstone, 114 East 52nd Street, New York, N. Y.

MY DEAR COUNT DEL DRAGO:

Following up my talk with you on Friday and your later telephone communication, I got in touch with Mr. Coudert

and told him what your suggestion was. To make the matter perfectly clear, my thought was, in view of what has happened, to see if by sitting around in conference some sort of understanding or settlement might be effected.

It seems that your theory of the settlement effected in 1908 or 1909 and the subsequent settlement of the 1916 suit and that of Mr. Coudert do not coincide. It seems to me that the first thing that both sides should try to accomplish is to see whether or not they can agree on what these two settlements decided. Rather than go to a long protracted litigation, it might be that both sides can come to some understanding as to what the former suits were all about and what was settled in 1908 and 1916. Personally I feel very optimistic that both sides can agree on what these various settlements aimed at.

So far as the objections to the probate of the will are concerned, I told Mr. Coudert that you would be willing to sit around in a conference to see what could be done, pro-
[fol. 59] vided he withdrew all objections to the probate of the present will and allowed it to go to probate. Mr. Coudert said his wife was just as anxious to avoid litigation as you are, but he felt unwilling to do anything about withdrawing his objections to the probate, but was entirely willing to indefinitely postpone the probate proceedings with a view of trying to settle the whole matter in some amicable way. If some settlement can be reached, of course, the will contest will end and the will can be admitted to probate.

Personally I feel that both sides should make some attempt to arrive at a conclusion rather than have a long drawn out litigation that will be expensive and an annoyance to all concerned.

Yours sincerely, (Signed) Morgan J. O'Brien, Jr.

[fol. 60] PART OF CLAIMANT'S EXHIBIT 2

(Letter of Grant & Clark)

November 10, 1937.

Don Giovanni del Drago, 4 Via Solaro, San Remo, Italy.

DEAR SIR:

We acknowledge receipt of your letter dated October 28, 1937. This morning we cabled you by deferred cable as follows:

"Believe adverse party will institute action against estate claiming decedent had only life estate in property unless we can satisfy her no cause of action exists stop in our opinion matter was disposed of in first suit we desire all papers letter follows."

Under the Will of the late August Schmid, two-thirds of his estate was left to his two children (one of whom was the late Pauline S. Murray) and one-third was directed to be held in trust during the lifetime of Donna del Drago, the income therefrom to be paid to her and upon her death the principal to go to the two daughters. Accordingly, the interest of Donna del Drago in the estate of August Schmid was only a life estate in one-third of his property. Donna del Drago would also have been entitled to a further share by reason of the death of one of their children, Josephine, who died without leaving a Will.

[fol. 61] Now upon Donna del Drago's death Mr. Coudert has asked us whether Mrs. Murray's estate or Mrs. Coudert do not still have a remainder interest under the will of August Schmid.

We believe that this question was finally disposed of in the former litigations and that Mrs. Murray received everything to which she was entitled, and that neither her estate nor her daughter have any further interest in the estate of August Schmid, or any claim against the estate of Donna del Drago.

As you probably know, in 1908 Mrs. Murray brought an action in the Supreme Court against Donna del Drago individually and as Executrix of and Trustee under the Will of August Schmid, deceased, and Lion Brewery of New York City. This action was settled by agreement dated May 18th, 1909. There was also another action in 1918, which was likewise settled.

We are attempting to gather all the information possible in order that we may be in a position to satisfy Mrs. Coudert that she has no claim. Some of the papers are in this office and we assume that certain of the original documents will be found in Donna del Drago's safe deposit boxes. However, we do not know just what we will find when the boxes are opened. Our reason for requesting you to bring with you any papers you might find in Italy relating to this question was in order that we would have all the available papers at our disposal.

Our firm did not appear in either of these two actions nor did any of our predecessor firms and, therefore, it is not surprising that we do not have in our files all of the papers in connection therewith. However, we have made an extended search of our files and have come across certain of [fol. 62] the important papers. In the first action the firm of Parsons, Closson & McIlvaine were the attorneys of record. We have communicated with them in an attempt to ascertain whether they had in their possession any of the papers in that action, but we were advised that their file in that action was destroyed by them prior to 1927.

In the second action Donna del Drago was represented by the then firm of Bowers & Sands. The matter was handled by John M. Bowers and later by his son, Spotswood D. Bowers. We have not communicated with Laughlin, Gerard, Bowers & Halpin, the successor to the firm of Bowers & Sands, because we desire to avoid any additional expense, if possible. However, if you desire that we do so, we can require Laughlin, Gerard, Bowers & Halpin to examine their records and see what papers they have. It is possible that they have the important papers in connection with both of these actions.

Will you kindly bring with you the printed volumes to which you refer in your letter and any other papers that you may be able to find. We note that you say that some papers may be in the Manhattan Storage Warehouse Company.

We assure you that we will keep you advised as to how this matter progresses.

In your recent letters we notice that our address is given as No. 207 Madison Avenue instead of No. 270 Madison Avenue, which is the correct address.

Very truly yours, Grant & Clark.

LF:RO.

[fol. 63] EXHIBIT 12

Decedent's Will Dated August 19, 1907

I, Josephine Schmid, of the Borough of Manhattan, in the City, County and State of New York, do hereby make, publish and declare this to be my last Will and Testament.

. . . . . .

Second: All my estate, real, personal and mixed and wheresoever situate I hereby give, devise and bequeath unto my friends Morgan J. O'Brien, lawyer, Algernon S. Frissell, President of the Fifth Avenue Bank of New York, and George E. Mott, lawyer, all of the Borough of Manhattan, New York City, and the survivors and survivor of them, To Have and To Hold the same in Trust, however, for the following uses and purposes, to wit: to collect the rents, income, interest, dividends and revenue of the said estate, and * * * to pay over the net semi-annual income of my said estate to my daughter Pauline Murray, wife of Hugh A. Murray, of the Borough of Manhattan, New York City, during the term of her natural life, and upon her death to apply said net semi-annual income * * * to the support, maintenance and education of my grand-daughter Pauline) Josephine Murray, daughter of my said daughter Pauline Murray, until my said grand-daughter shall attain the age of twenty-one years, and upon my said grand-daughter attaining the age of twenty-one years, to pay over to her any unexpended income then on hand, and thereafter the entire net income of said estate until she shall attain the age of forty years, and upon her attaining [fol. 64] the age of forty years, I give, devise and bequeath unto my said grand-daughter all my estate, real, personal and mixed, To Have and To Hold the same to her and her assigns forever. * * * It is my will, however, that my daughter Pauline Murray shall have the use free of rent during the term of her natural life of my city residence No. 807 Fifth Avenue, in the Borough of Manhattan, City of New York, and my country residence at South Broadway, in the Village of Tarrytown, Westchester County, New York, and likewise of the premises No. 988 Fifth Avenue in the Borough of Manhattan, New York City, together with all the paintings, pictures, bric-a brac, articles of vertu, silver, plate, rugs, statuary, household utensils and furniture and furnishings of every description belonging to me contained therein.

* * * * * * *

Sixth: I hereby nominate and appoint my said friends Morgan J. O'Brien, Algernon S. Frissell and George E. Mott to be the executors of this my last Will and Testament.

In witness whereof, I have hereunto subscribed my name and affixed my seal to this my last Will and Testament this

nineteenth day of August, in the year of our Lord, One thousand, nine hundred and seven.

Josephine Schmid (L. S.).

Witnesses: Edw. J. Dwyer, Rudolph Albert and Gustave F. J. Amther.

[fol. 65] EXHIBIT 14

Decedent's Will Dated August 3, 1909

In the name of God, amen:

I, Josephine del Drago (formerly Josephine Schmid, wife of Giovanni del Drago, of the Borough of Manhattan, in the City, County and State of New York, do hereby make, publish and declare this to be my Last Will and Testament.

* * * * * * *

And whereas, under a certain written or printed agreement between my daughter Pauline Murray and myself, bearing date the 18th day of May, 1909, a duplicate original of which is deposited with the Farmers Loan and Trust Company of the City of New York, I have obligated myself to pay to my said daughter, or for her benefit, Several hundred thousands of Dollars, now in case I shall die before all of said payments shall have been made, I hereby direct my executors to make such payments as shall remain unpaid at the time of my death, under the provisions of said agreement.

Second: I hereby give and bequeath unto my granddaughter Pauline Josephine Murray, daughter of my daughter Pauline Murray, the sum of Fifty thousand Dollars ($50,000).

* * * * * * *

Ninth: I hereby give and bequeath unto my Executors, hereinafter named, and the survivor of them, the sum of Two hundred thousand Dollars ($200,000), To have and To hold the same, In Trust, however, for the following uses and purposes, to wit: To invest the same and keep the same invested, and pay over the net semi-annual income thereof, unto my beloved husband Giovanni del Drago, during the term of his natural life, and upon his death, I give and

[fol. 66] bequeath the sum so to be held in trust, unto Marcel Gentili, of Florence, Italy, son of my said husband by a former wife, To have and To hold the same forever.

. . . . . .

Eleventh: I have purposely refrained from making any provision in this Will for my daughter Pauline Murray, for the reason, among others, that under and by virtue of the Agreement mentioned in that paragraph of this Will, marked and numbered "First," she has received, and will receive from me, or there will be expended by me for her benefit, a very large sum of money, and upon my death, she will become the absolute owner of the entire capital stock of the corporation Lion Brewery, of New York City, worth Several millions of Dollars, and I feel that she has already been amply provided for, and that in consideration of that situation, and the suit which she instituted against me in the Supreme Court, I am at liberty to dispose of my property as I have done in this Will.

Twelfth: All the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situated, I hereby give, devise and bequeath unto my beloved husband Giovanni del Drago, To have and To hold the same forever.

. . . . . .

In witness whereof, I have subscribed my name and affixed my seal to this my Last Will and Testament, this third day of August, in the year of our Lord, Nineteen hundred and nine.

Josephine del Drago (L. S.)

Witnesses: Frederick E. Grant, Jno. R. Walett and Wm. H. Leupp.

[fol. 67] EXHIBIT 18

Decedent's Will, Dated June 6, 1918

In the Name of God, Amen.

I, Josephine del Drago (formerly Josephine Schmid), wife of Giovanni del Drago, of the Borough of Manhattan, City of New York, in the State of New York and United

States of America, do hereby make, publish and declare this to be my Last Will and Testament:

* * * * * * *

Fifth: I hereby give and bequeath unto the Equitable Trust Company of New York, * * * the sum of Two hundred thousand Dollars ($200,000.), *To have and To hold* the same, *In Trust, however,* for the following uses and purposes, to wit: To invest the same and keep the same invested and pay over the net semi-annual income thereof unto my beloved husband, Giovanni del Drago, during the term of his natural life, and upon his death, to pay over the net semi-annual income of said trust fund unto Marcel Gentili, * * * son of my said husband by a former wife, during the term of his natural life, and upon the death of my said husband and his said son I give and bequeath the principal sum of Two hundred thousand Dollars ($200,000) so to be held in trust unto the lawful issue of said Marcel Gentili, if any he shall have, him surviving, to be divided between them equally per stirpes and not per capita.

* * * * * * *

Sixth: All the rest, residue and remainder of my estate, real, personal and mixed and wheresoever situated, I hereby give, devise and bequeath unto my beloved husband, [fol. 68] Giovanni del Drago, To have and To hold the same unto him and his heirs and assigns, forever.

* * * * * * *

Seventh: I purposely refrain from making any provision in this Will for my daughter, Pauline Murray, for the reason, among others, that under and pursuant to the provisions of a written agreement between her and myself bearing date the 18th day of May, 1909, and which settled a law suit which was brought against me in the Supreme Court, she received from me a large amount of property, and upon my death it was provided that she should become the absolute owner of the entire capital stock of the corporation Lion Brewery of New York City, and since the making of said agreement she brought another suit against me in the Supreme Court of the State of New York in settlement of which she received on the 9th day of April, 1918, instead of at my death, the entire capital stock of the said corporation, Lion Brewery of New York City, freed from any right or interest I had therein, which corporation has

assets of several millions of dollars over and above its liabilities, and I feel that she has been amply provided for and that I am at liberty to dispose of my property as I have done in this Will.

* * * * * * *

In witness whereof I have subscribed my name and affixed my seal to this my Last Will and Testament this sixth day of June in the year of our Lord nineteen hundred and eighteen.

Josephine del Drago (L. S.).

Witnesses: Francis M. Scott, Spotswood D. Bowers and Frederick E. Grant.

[fol. 69] EXHIBIT 19

Codicil to Decedent's Will of June 6, 1918, Dated May 9, 1932

I, Josephine del Drago (formerly Josephine Schmid), wife of Giovanni del Drago, of the Borough of Manhattan, City of New York, in the State of New-York, and United States of America, being of sound and disposing mind and memory, having made my Last Will and Testament bearing date the 6th day of June, one thousand nine hundred and eighteen, do now make this Codicil to be taken as part of the said Last Will and Testament.

First

I hereby ratify and confirm my said Last Will and Testament in every respect except in so far as any part of said Last Will and Testament is inconsistent with this Codicil.

* * * * * * *

Fifth

* * * * * * *

Now, I do hereby revoke the said Fifth Paragraph of my said Last Will and Testament, * * * and substitute in lieu and place thereof the following provisions:

In the event that Marcel del Drago Gentili, son of my beloved husband by a former wife, shall survive me, I

hereby give and bequeath unto Central Hanover Bank and Trust Company, a Banking Corporation, now having its principal office at No. 70 Broadway, Borough of Manhattan, New York City, the sum of One hundred and fifty thousand ($150,000) Dollars, to have and to hold the same, In Trust, however, for the following uses and purposes, to wit: [fol. 70] To invest the same and keep the same invested and pay over the net income thereof unto my beloved husband, Giovanni del Drago, during the term of his natural life, and upon his death, or at my death, if my said husband shall not survive me, to pay over the income thereof to said Marcel del Drago Gentili * * *.

* * * * * * *

Sixth

Whereas, under the Sixth Paragraph of my said Last Will and Testament, I have made provision for the disposition of my residuary estate

* * * * * * *

Now, I hereby revoke the said Sixth Paragraph, above set forth, of my said Last Will and Testament and substitute in lieu and place thereof the following provisions:

All the rest, residue and remainder of my estate, real, personal and mixed, * * * I hereby give, devise and bequeath unto my beloved husband, Giovanni del Drago, to have and to hold the same unto him and his heirs and assigns forever.

In the event, however, that my said husband shall not be living at the time of my death, then and in that event, I give, devise and bequeath my said residuary estate as follows, to wit:

(a). To Don Urbano del Drago, if living at the time of my death.

(b) If said Urbano del Drago be not then living, to his first born son, if then living.

[fol. 71] (c) If neither said Urbano del Drago nor his first born son be then living, then to the first born son of his first born son, if then living.

(d) If none of those described in (a), (b) and (c) above shall be then living, then to that one of the male issue of

said Urbano del Drago who would then be considered as his representative in the male line according to the principle of primogeniture.

(e) If neither said Urbano del Drago nor any descendants of his in the male line be then living, then in equal parts to the then living issue of said Urbano del Drago, per stirpes.

(f) If neither said Urbano del Drago nor any of his issue be then living, I give, devise and bequeath my said residuary estate to Clemente del Drago and Mario del Drago, sons of Luigi del Drago, share and share alike, if they are both then living; and if one or both of said sons of Luigi del Drago shall not be then living, I give, devise and bequeath my said residuary estate to such of said sons of Luigi del Drago as shall then be living and the then living issue of such of them as shall have died leaving issue, per stirpes and not per capita, said issue to receive the share to which their parents would have been entitled if living.

* * * * * * *

Eighth

Whereas, my daughter, Pauline Murray, has died subsequent to the execution of my said Last Will and Testament, [fol. 72] I hereby revoke the Seventh Paragraph of my said Last Will and Testament.

* * * * * * *

In Witness Whereof, I have hereunto subscribed my name at the end hereof and affixed my seal to this Codicil to my Last Will and Testament, dated the 6th day of June, 1918, this 9th day of May, Nineteen hundred and thirty-two.

Josephine del Drago (L. S.).

Witnesses: Byron Clark, Jr., Littleton Fox and Robert T. Hawthorne.

[fol. 73] EXHIBIT 20

Decedent's Will Dated October 30, 1933

In the Name of God, Amen!

I, Josephine del Drago (formerly Josephine Schmid) wife of Giovanni del Drago, being a citizen of the United

States and a resident of the Borough of Manhattan in the City, County and State of New York, United States of America, and being of sound and disposing mind, memory and understanding, and knowing and appreciating the uncertainty of life, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any former wills or codicils thereto by me at any time made.

* * * * * * *

Fifth: I give and bequeath to Paula Murray Coudert of the City, County and State of New York, my diamond tiara, to be hers absolutely and forever.

Sixth: I give and bequeath to my beloved husband, Giovanni del Drago, all my paintings, statuary, jewelry, furniture, silver, household and personal effects, to be his absolutely and forever.

Seventh: I give and bequeath the sum of Three hundred thousand ($300,000.00) Dollars to my beloved husband Giovanni del Drago, to be his absolutely and forever.

Eighth: I give and bequeath to Marcel Gentili the sum of Two hundred thousand ($200,000.00) Dollars, to be his absolutely and forever.

[fol. 74] Ninth: All the rest, residue and remainder of my estate, real, personal or mixed, and wheresoever situated, * * * I give, devise and bequeath to the Corn Exchange Bank Trust Company, * * * In Trust, however, to invest the same and collect the rents, issues and profits therefrom, and to apply the same for the use, maintenance and support of my beloved husband, Giovanni del Drago during the term of his life, and upon his death I direct my trustee to pay over the principal of said estate to Marcel * * * son of my said husband by a former wife, and in case said Marcel Gentili shall then be dead but shall leave children or issue of children surviving, in that case I direct that the principal shall be divided in equal shares among such children and issue *per stirpes;* and in the event that said Marcel Gentili shall be dead and leave no children or issue then surviving, then and in that case I direct that the principal shall be paid over to Luigi del Drago, and should he also be then dead but leave children or issue of children surviving, then and in that case I direct

that the principal shall be divided in equal shares among such children and issue of children *per stirpes*.

* * * * * * *

In witness whereof I have hereunto subscribed my name at the end hereof, and affixed my seal on this 30th day of October in the year of our Lord Nine hundred and thirty-three.

Josephine del Drago. (Seal.)

Witnesses: Frank C. Laughlin, James W. Gerard, Spotswood D. Bowers and Walter G. Zorn.

[fol. 75] EXHIBIT 21

Decedent's Will Dated March 27, 1934 Admitted to Probate Herein

In the Name of God, Amen!

I, Josephine del Drago (formerly Josephine Schmid) wife of Giovanni del Drago, being a citizen of the United States and a resident of the Borough of Manhattan, in the City, County and State of New York, United States of America, and being of sound and disposing mind, memory and understanding, and knowing and appreciating the uncertainty of life, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any former wills or codicils thereto by me at any time made.

First: I direct my executors hereinafter named to pay all my just debts and funeral expenses as soon after my death as is practical.

Second: I give and bequeath unto the person who at the time of my death shall be Archbishop of the Roman Catholic Church for the Diocese of New York the sum of One thousand ($1,000.00) Dollars.

Third: I give and bequeath unto the Columbus Hospital at No. 227 East 19th Street, Borough of Manhattan, City, County and State of New York, the sum of Two thousand ($2,000.00) Dollars.

Fourth: I give and bequeath unto my friend George E. Mott of F.. Rockaway, Borough of Queens, New York County, and my friend Frederick E. Grant of 67 Wall Street, [fol. 76] Borough of Manhattan, New York City, the sum of Two thousand five hundred ($2,500.00) Dollars each, as a token of my friendship and appreciation of faithful services rendered to me by them.

Fifth: I give and bequeath to Paula Murray Coudert of the City, County and State of New York, my diamond tiara, to be hers absolutely and forever.

Sixth: I give and bequeath to my beloved husband, Giovanni del Drago, all my paintings, statuary, jewelry, furniture, silver, household and personal effects, to be his absolutely and forever.

Seventh: I give and bequeath the sum of Three hundred thousand ($300,000.00) Dollars to my beloved husband Giovanni del Drago, to be his absolutely and forever.

Eighth: I give and bequeath to the Corn Exchange Bank Trust Company, 13 William Street, Borough of Manhattan, City, County and State of New York, the sum of Two hundred thousand ($200,000.00) Dollars, In Trust, however, to invest the same and collect the rents, issues and profits therefrom and to apply the same for the use, maintenance and support of Marcel del Drago of Rome, Kingdom of Italy, son of my husband by a former marriage, during the term of his life, and upon his death I direct my trustee to pay over the principal of said estate in equal shares *per stirpes* to his children born in lawful wedlock, and/or the children born in lawful wedlock of any such child who shall then be deceased. By the term "lawful wedlock", as used throughout this will, I intend to exclude an adopted or [fol. 77] legitimatized child as well as an illegitimate child. In the event that Marcel del Drago shall leave no such children or such children of such children, then and in that event I direct my trustee to pay over the principal of said estate in equal shares *per stirpes* to the children born in lawful wedlock to Clemente del Drago, son of Luigi del Drago, a brother of my husband, Giovanni del Drago and/or the children born in lawful wedlock of any such child who shall then be deceased.

Ninth: All the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated, and includ-

ing any and all property over which I have power of appointment, and including all lapsed legacies, I give, devise and bequeath to the Corn Exchange Bank Trust Company, 13 William Street, Borough of Manhattan, City, County and State of New York, In Trust, however, to invest the same and collect the rents, issues and profits therefrom and to apply the same for the use, maintenance and support of my beloved husband Giovanni del Drago of Rome, Kingdom of Italy, if he shall survive me, during the term of his life, and upon his death, or at my death if he shall have predeceased me, I direct my trustee and/or executors, as the case may be, to pay over the principal of said estate in equal shares *per stirpes* to the children born in lawful wedlock of Mario del Drago, second son of Luigi del Drago, of Rome, Italy, a brother of my husband, and/or the children born in lawful wedlock of any such child which may then be deceased, to be theirs absolutely and forever.

[fol. 78] Tenth: In the event that my said husband and I shall die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will and that it shall be deemed that I have predeceased my said husband, and that my will and any and all provisions contained therein shall be construed on the assumption and basis that I shall have predeceased my husband.

Eleventh: I direct that my executors and trustee shall have full power and authority in their absolute discretion to hold and retain any or all of the stocks, bonds, mortgages, securities or any other property, real or personal, in which my estate or any part thereof may be invested at the time of my death, or which may at any time be received by my executors and/or my trustee without regard to whether the same shall be of the class of investments permitted by law for trustees' investments, and to invest and reinvest the assets from time to time constituting my estate in such real property, mortgages, stocks, bonds or other securities as they may deem advisable without the legal restrictions applicable to trustees.

My executors and trustee are hereby authorized and empowered in their absolute discretion to sell, at public or private sale, to mortgage, pledge or lease for such prices and upon such terms and conditions as may to them seem

advisable, any part or all of the property, real, personal or mixed, of which I may die seized or possessed, or in which my estate may be at any time invested.

Twelfth: I authorize my executors and trustee, and my executors and trustee are hereby granted full power and [fol. 79] authority, to enter into agreements of reorganization, merger or dissolution of any corporation in which they may at any time hold stock, bonds or notes or other securities, and in case thereof to surrender the stock, bonds, notes or other securities of said company and accept in exchange thereof stocks of the reorganized or merged companies, or bonds or notes thereof or other real or personal property; and said executors and trustee shall have power to pay any and all expenses or disbursements which they may incur in connection with such reorganization, merger or dissolution, including the payment of any assessment, whether same be for the purpose of purchasing securities in the reorganized company or not; and said executors and trustee shall also have power at any time to join any stockholders' protective committee of any company in which they may then own stock, bonds or notes for the protection of the interest of the estate hereby transferred, and to pay their proportionate share of the expenses of such committee.

I also authorize my said executors and trustee to make advances for the protection of any securities held by them or to secure any rights or options given thereunder, and I hereby authorize my said executors and trustee to make said advances from the trust funds held by them as an investment of the same.

Thirteenth: My executors and trustee shall also have the power

(a) to exercise any rights to subscribe for securities in [fol. 80] corporations in which the funds of the estate may then be invested, whether same be in the character of investments herein authorized for the reinvestment of the funds of the estate or not;

(b) to vote in person or by proxy upon all stocks or other securities held by them;

(c) to exercise any option contained in any stocks, bonds or other securities for the conversion of the same into other securities;

(d) to treat as income all extraordinary cash dividends and all dividends on stock of mining and oil companies paid out and representing in whole or in part depletion of reserves. Stock dividends, except current dividends paid in stock in the regular course of business, liquidating dividends and rights to subscribe to stock of the corporation declaring such dividends or issuing such rights shall be treated as principal of the estate. The decision of the executors and/or trustee as to whether any dividends or rights are capital or income, or partly capital and partly income, shall be conclusive and binding upon all parties interested in the estate;

(e) to make any division or distribution of the funds of the estate, or any part thereof, in kind or in money or partly in kind and partly in money; to allot any property, including an undivided interest therein, to any share, whether or not the same or a different kind of property is allotted to other shares, and in connection with any such division or distribu- [fol. 81] tion the determination of the executors and/or trustee as to values shall be final and conclusive.

Fourteenth: I further direct that my executors may in their discretion, instead of selling the securities of my estate for the purpose of setting up the various trust funds, turn over to the trustee property in kind at a valuation which, in the judgment of my executors, is equal to the amount of the trust fund established, and I direct that their valuation and choice of securities shall be final and conclusive.

Fifteenth: I hereby nominate, constitute and appoint my said husband, Giovanni del Drago, and my friend, Frederick E. Grant, to be the executors of my Last Will and Testament, and I direct that they shall not be required to furnish bonds for the faithful performance of their duties.

Sixteenth: If either said Giovanni del Drago or said Frederick E. Grant shall for any reason fail to qualify as such executor, or shall die before or after qualifying, or shall resign, renounce or be removed, then and in every or any such event I nominate, constitute and appoint Byron Clark as an executor of this my Last Will and Testament, and I direct that he shall not be required to furnish bond for the faithful performance of his duties, and in the event of his qualifying as such executor said Byron Clark shall

have and possess all the powers and privileges herein given to my executors named herein; and I further direct that if both said Giovanni del Drago and Frederick E. Grant shall for any reason fail to qualify as such executors or shall die either before or after qualifying, or shall resign, re- [fol. 82] nounce or be removed, then and in every or any such event I nominate, constitute and appoint D. Gordon Jones, Assistant Manager of the Park Avenue Branch of Corn Exchange Bank Trust Company, at 52nd Street and Park Avenue, Borough of Manhattan, City, County and State of New York, as an executor of this my Last Will and Testament, and I direct that he shall not be required to furnish bond for the faithful performance of his duties, and in the event of qualifying as such executor said D. Gordon Jones shall have and possess all the powers and privileges herein given to my executors. In the event that at any time after the above have qualified or refused to qualify, or having qualified shall cease to act for any reason as executors, so that there shall be but one executor, then and in that event, and as often as the same shall occur, the remaining executor shall have the right to appoint by designation in writing a successor executor, and should there be at any time no remaining executor, then and in that event the executor or executors, administrator or administrators, as the case may be, of the estate of the last acting executor, shall have the right to appoint a successor executor, and any executor so appointed shall have all the rights and powers given to the executors named in this Will, but an executor so appointed shall be required to give the statutory bond.

In Witness Whereof I have hereunto subscribed my name at the end hereof, and affixed my seal on the 27th day of March in the year of our Lord nineteen hundred and thirty-four.

Josephine del Drago.

Witnesses: Frank C. Laughlin, James W. Gerard and Spotswood D. Bowers.

[fol. 83] In Surrogate's Court, County of New York

Opinion

The issues in this contested accounting proceeding are disposed of as follows:

(1) Two of the beneficiaries of this estate named in the will of the testatrix, which was executed in New York, assert that any apportionment of the federal estate tax made pursuant to the provisions of section 124, Decedent Estate Law, is violative of certain articles of the federal and state constitutions.

The surrogate overrules all such objections to the constitutionality of the statute and to the equitable proration of the tax to be made in this estate against the respective interests of all the beneficiaries named in the will. Reliance for this conclusion might be based alone upon the authority of Matter of Scott (158 Misc., 481, aff'd 249 App. Div., 542, aff'd 274 N. Y., 538, certiorari denied sub nom. Northwestern Mutual Life Ins. Co. v. Central Hanover Bank & Trust Co., 302 U. S., 721). In that case general grounds of the unconstitutionality of the statute were raised. Specifically it was also asserted that section 124, Decedent Estate Law, had been unduly extended in its scope to permit the apportionment of the tax against the insurance company and the beneficiaries of insurance policies, the proceeds of which had been included in the net taxable estate. The apportionment involved both the federal and New York State estate tax. Mr. Surrogate Delehanty, in his opinion, reviewed the plan of the new section and the applicable federal authorities, and sustained its complete validity. His decision was affirmed by the appellate courts of our state, and certiorari was denied by the United States Supreme Court. In Matter of Kaufman (170 Misc., 436) and Matter [fol. 84] of Ryle (170 Misc., 450) further discussion of the legality of the section was made and the conclusion of constitutionality reiterated. No appeal was taken from either of those decisions.

In the pending proceeding no question of the proration of the tax upon insurance moneys or upon transfers made inter vivos, which might have been included in the net taxable estate, is involved. If such question had arisen necessarily the determination reached in Matter of Scott (supra) would

have destroyed any foundation for a contention against the right of apportionment. But the disposition of a proration as against the beneficiaries named in the will, such as is here involved, is even simpler of understanding. The property passes at death by virtue of a privilege granted by the State of New York. That privilege extends not only to the making of the will, but also to the imposition of an estate tax upon the succession, plus power in the Legislature to declare what persons shall bear the burden of the federal and state tax. So far as the words of the federal statute are concerned, "the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter." (Hough, J., in Edwards v. Slocum, 287 Fed. Rep., 651, 653, aff'd, without opinion, 264 U. S., 61.) To that statement may be added, where the Legislature has provided the method of apportionment of either or both of the taxes, as an incident to the privilege of inheritance, the courts must apply and enforce the statutory rules.

[fol. 85] Subsequent decisions of the federal courts have reaffirmed the right of the state of the domicile of the testator to provide for the distributions or allocation of the federal estate tax (Young Men's Christian Association v. Davis, 264 U. S., 47, 51; Hepburn v. Winthrop, 83 Fed. [2d], 566). Once the tax is levied and paid to the United States Government, its interest in the source of payment terminates. The states may adopt varying rules. New York, in its legislation, has chosen to apply a rule based upon justice and equity. It has permitted the testator to say where the burden of the tax shall fall, by an appropriate direction in his will or in the inter vivos indenture. In the absence of any such direction, the burden of the tax is laid against each of the beneficiaries proportionately to the pecuniary advantage received.

The objectants, who assert unconstitutionality here, cite statements in opinions of the Court of Appeals rendered prior to the enactment of section 124, Decedent Estate Law, in Matter of Hamlin (226 N. Y., 407) and in Matter of Oakes (248 N. Y., 280). These statements have not the slightest application to the changed situation created by the new section, which took effect on September 1, 1930. The legislation had been drafted and its passage recom-

mended by the Decedent Estate Commission. Its purpose was fully set forth in the note printed with the bill (Combined Reports of the Decedent Estate Commission, page 338). That note was indicative of the legislative intent. In it the hardship of the then existing rule, which imposed the full burden of the federal and state tax upon the residuary legatees, was stressed. Matter of Hamlin (supra) and Matter of Oakes (supra) were cited in the note as well [fol. 86] as the decision of Judge Hough in Edwards v. Slocum (supra). The note recited, "that each state is at liberty to determine according to its own laws in what manner the federal estate tax shall be borne by the persons interested in the estate." All existing rules as to the specific source of payment of the tax were thus intended to be changed by the new section, which provided for equitable allocation, unless the will specifically directed a different form of imposition of the tax. When the section was enacted the Legislature must be presumed to have known what interpretation had theretofore been put upon the statutes by the courts. It was charged with knowledge of existing legal principles which, in framing the statute, it desired to alter and improve. "The general rule, as I understand it, is that when the legislature amends or enacts anew a statute it will be assumed that it had full knowledge of all the judicial decisions theretofore made interpreting the statute as then existing, and that being so, the new enactment must be read in the light of such previous interpretation" (McLaughlin, J., in Matter of Cole, 235 N. Y., 48, 53, citing, Orinoco Realty Co. v. Bandler, 233 N. Y., 24; Komada & Co. v. United States, 215 U. S., 392; Caesar v. Bernard, 156 App. Div., 724, affirmed 209 N. Y., 570).

It should also be noted that the provisions of section 124, Decedent Estate Law, were made expressly applicable to the estates of persons dying after August 31, 1930. The testatrix here made her will in 1934; she died on October 8, 1937. It was her privilege to direct what parts of her estate or what persons should bear the burden of the tax. Her will is silent in that respect. She is presumed, therefore, to have drawn her will with knowledge that the statute [fol. 87] providing for an equitable apportionment of the taxes would apply to it.

No federal question nor any ground of unconstitutionality, therefore, attaches to the provisions of section 124, Decedent Estate Law, nor to the method of the equitable ap-

portionment of the tax made pursuant to its terms. The objecting beneficiaries must bear their fair portion of both the federal and state tax assessed upon the passing of the decedent's property.

* * * * * * *

(4) The surrogate holds that the will of the decedent executed by her and established in the Republic of France, by which she disposed of all of her property in that country to her husband, constituted a separate and independent disposition from the provisions contained in her last will admitted to probate in New York. A similar determination is made as to the will executed by her and established in the Kingdom of Italy. The executors in New York are relieved from and are exempt from any responsibility for the collection or administration of the assets either in France or in Italy. Each of these three wills affected only the properties and assets within the respective jurisdiction. Moreover, the instruments themselves and the extrinsic evidence establish that the general clause of revocation of prior wills contained in the New York will, did not revoke nor in any manner affect the French or Italian will of the testatrix. In this respect the decision of the Court of Appeals in Matter of Smith (254 N. Y., 283) is a controlling authority. A similar conclusion, that instruments affecting the dis- [fol. 88] position of property in two jurisdictions were separate and independent of each other, was reached by me in Matter of Levy (174 Misc., 923).

* * * * * * *

(9) The objection to the payment to Mr. Wilson for expenses in connection with foreign assets in the sum of $930, as set forth in Schedule C of the account, is sustained, and that amount is surcharged against Mr. Del Drago, the co-executor, for whose individual benefit the expenditure was made. The disallowance of that item is necessarily based upon the surrogate's determination that neither the executors' accounting here nor the attorney for one of them had any responsibility for the supervision or collection of the foreign assets either in France or in Italy.

* * * * * * *

Submit decree on notice settling the original and supplemental accounts, in accordance with this decision and any

additional instructions given by the surrogate at the hearing held on June 25, 1940. Such decree may contain a reservation for the submission of a supplemental confirmatory decree after the service and return of the supplemental citation as to the additional infant party recently brought into the proceeding. The special guardian for such infant is instructed to file a supplemental report after the return of such citation and before the entry of the supplemental decree.

[fol. 89] STIPULATION WAIVING CERTIFICATION

It is stipulated that the foregoing record comprises true and correct copies of the notice of appeal, the decrees from which the appeal is taken and the decision upon which said decrees were made, and true and correct extracts from the account, the pleadings, the minutes of the hearing, the exhibits marked in evidence thereon and all papers used in the Court below, on file in the office of the Clerk; and certification thereof is hereby waived.

Dated, New York, March —, 1941.

Ludwig M. Wilson and Robert W. Maloney, Attorneys for Appellants. Grant, Clark & Fox, Attorneys for Respondent, Byron Clark, Jr., as Executor. Lawrason Riggs, Jr., Special Guardian Respondent. Harold W. Hastings, Special Guardian Respondent. Laughlin, Gerard, Halpin & Graham, Attorneys for Respondent-Trustee, Corn Exchange Bank Trust Co.

[fol. 90] STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, Louis J. Rezzemini, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Matter of Giovanni del Drago and Byron Clark, Jr., as Executors of Josephine del Drago, Deceased, decided by the Court of Appeals on the twenty-seventh day of November, 1941, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this ninth day of February, 1942.

Louis J. Rezzemini, As Reporter of the Court of Appeals of the State of New York.

Attest: (L. S.) John Ludden, Clerk of the Court of Appeals. (Seal.)

STATE OF NEW YORK,
Court of Appeals:

I, Irving Lehman, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that John Ludden is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Louis J. Rezzemini is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Matter of Giovanni del Drago and Byron Clark, Jr., as Executors of Josephine del Drago, Deceased, decided by the said Court of Appeals on the twenty-seventh day of November 1941, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of

Appeals, and that the signature of John Ludden, as clerk of said court, appended thereto is the true and genuine signature of said John Ludden, and the signature of Louis J. Rezzemini, as reporter of said court, appended thereto is the true and genuine signature of said Louis J. Rezzemini.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York on the 16 day of February in the year one thousand nine hundred and forty-two.

Irving Lehman, as Chief Judge of the Court of Appeals of the State of New York.

[fol. 91] In the Matter of the Accounting of GIOVANNI DEL DRAGO and Byron Clark, Jr., as Executors of Josephine Del Drago, Deceased

GIOVANNI DEL DRAGO, Individually and MARCEL DEL DRAGO, Appellants; Byron Clark, Jr., as Executor, et al., Respondents

(Decided November 27, 1941)

Appeal to the Court of Appeals by legatees from an order and decree of the Surrogate's Court, New York County, (Foley, J.) settling the accounts of the trustee and directing payment of federal estate taxes out of the shares of the individual legatees.

Henry Cohen, Ludwig Wilson and *Robert W. Maloney* for appellants.

Lawrason Riggs, Jr., for Angela del Drago et al., respondents.

Littleton Fox and *Anthony J. Caputo* for Byron Clark Jr., as executor, respondent.

Harold W. Hastings and *Sydney A. Hellenbrand* for Harold W. Hastings, as special guardian, respondent.

RIPPEY, J.:

Josephine del Drago died October 8, 1937, while a resident of New York State, leaving a last will and testament dated March 27, 1934, which was probated by the Surrogate of New York County, and Giovanni del Drago

and Byron Clark, Jr., were appointed and thereupon qualified as executors of her estate. Upon an accoun-ing by the executors to which all parties interested in the estate were parties, it appeared that although no final determination has been made as to the amount of state and federal estate taxes properly assessable, the executors have already paid nearly $300,000 thereon out of the general assets of the estate. Before distribution to beneficiaries, the executors properly requested a determination of the question of whether the taxes so paid should be apportioned to, prorated among and deducted from the shares passing under the will to the several legatees and devisees or paid entirely from the remainder residuary estate.

The deceased left a substantial estate in the United States and also property in France and Italy which latter is not the subject-matter of this accounting or involved in the point to be decided. Following small specific legacies for various persons, the deceased left to her husband, Giovanni del Drago, who is domiciled in the United States, various articles of personal property and effects by the *sixth* clause of the will, the sum of $300,000 by the *seventh* clause and the life use of the residuary estate under the *ninth* clause of the will. By the *eighth* clause of the will, she left to her stepson, Marcel del Drago of Rome, Italy, [fol. 92] the life use of $200,000 with remainder over, *per stirpes*, to his surviving children born in lawful wedlock and/or the children born in lawful wedlock of any such child of her stepson who should then be deceased. In the event that Marcel del Drago should leave no such children or such grandchildren surviving, the remainder was directed to pass to the children of Clemente del Drago, son of Luigi del Drago, a brother of her husband, born in lawful wedlock and/or to the children born in lawful wedlock of any deceased child or children. By the *ninth* clause of the will, the residue of the estate upon the death of her husband was to pass to the children born in lawful wedlock of Mario del Drago, the second son of Luigi del Drago, of Rome, Italy, and/or the children born in lawful wedlock of any such child who might then be deceased.

The will contains no direction as to how, by whom or out of what portion of her estate so devised and bequeathed the estate taxes should be paid. By objections and answer to the account, specific legatees and guardians for infant legatees have suitably put in issue the constitutionality of

chapter 709 of the Laws of 1930 (Decedent Estate Law, § 124 [Cons. Laws, ch. 13]) and chapter 710 of the Laws of 1930 as amended (Tax Law § 249-t of the Tax Law [Cons. Laws, ch. 60]) in so far as such statutes or either of them provide for the imposition, assessment or apportionment of the federal estate tax or any portion thereof against their legacies or interests in the estate of deceased. It is alleged that those acts of the New York State Legislature are violative of the provisions of article I, section 8, and article VI of the Constitution of the United States and of the Fourteenth Amendment thereto and in conflict with and in violation of the provisions of the Federal Estate Tax Law, being title III of the Revenue Acts of 1926 and 1932, as amended by the Revenue Acts of 1935, 1936 and 1938 as amended, and known as section 826 (b) of the United States Revenue Code (U. S. Code, tit. 26, § 826, par. [b]) and are consequently void. The Surrogate overruled the objections and ordered and adjudged that the executors apportion and prorate all estate taxes, whether federal or state, among the various persons who take under the will in accordance with state law. By direct appeal by Giovanni del Drago and Marcel del Drago from the final order of the Surrogate, the constitutional question is properly before this court. The question propounded which we consider is whether the State of New York may by statute regulate and determine the incidence of the federal estate taxes in the face of the uniformity, supremacy and due process clauses of the Federal Constitution and of a contrary congressional intent.

Article I of the Federal Constitution contains the uniformity clause and provides that "the Congress shall have [fol. 93] Power To lay and collect Taxes, Duties, Imposts and Excises * * *; but all Duties, Imposts and Excises shall be uniform throughout the United States * * *" and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" (§ 8). Article VI contains the supremacy clause and reads in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Section 1 of the Fourteenth Amendment to the Constitution provides, among other things, that "all persons born or naturalized in the United States, and subject to

the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Prior to the act of 1916, all federal acts imposing death duties made specific provision for the payment of the tax by the several legatees individually and severally out of their shares and not by the estate (1 U. S. Stat. 527, July 6, 1797; 12 U. S. Stat. 433, 485, 486, July, 1862; 13 U. S. Stat. 223, 285-291, June, 1864; 30 U. S. Stat. 448, 464-466, June, 1898, as amended by 31 U. S. Stat. 946, [1901]). They were emergency measures and made no provision for permanent excises. They provided for inheritance taxes and not estate taxes. A reading of the 1898 act would seem to indicate that the rate was based on the net estate but the individual legacies were taxed. The constitutionality of that scheme of death-duty taxation was sustained only by construction whereby it was held that the rate was fixed alone by the size of the legacy (*Knowlton* v. *Moore*, 178 U. S. 41). By 1916, forty-two states (including the State of New York) were imposing death duties upon individual beneficiaries of decedent's estates. In no case was such imposition an estate tax. They were all strictly inheritance taxes and so defined. Never before 1916, except as emergency measures, had the federal government invaded the field of inheritance taxation which the states considered their exclusive preserve. The proposal of Congress to tap that field for additional revenue met powerful opposition by the states with the result that political expediency and practical and constitutional considerations impelled Congress to abandon that idea and turn to a tax upon the net estate as a unit of taxation, a new and hitherto unused source of federal revenue, and leave the imposition of a tax upon the separate successions to the [fol. 94] property of each legatee or distributee to the several states (Congressional Record, 64th Congress, vol. 53, pt. 11, particularly at p. 10657, and pt. 15, Appendix, pp. 1495, 1942; *Matter of Hamlin*, 226 N. Y. 407; *Matter of Sherman*, 179 App. Div. 497; affd., 222 N. Y. 540; *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 348; *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 63; Gleason & Otis on The Law of Inheritance Taxation [4th ed., 1925],

pp. 7-19). The federal estate tax as then proposed and subsequently developed was fundamentally different from a state inheritance tax (*Knowlton* v. *Moore, supra*). The distinction is pointed out and the authorities reviewed in *Farmers Loan & Trust Co.* v. *Winthrop* (238 N. Y. 488) and in *Y. M. C. A.* v. *Davis* (*supra*) and needs no further elaboration or discussion here. The theory of the federal estate tax is that the transfers are part of the estate and the tax thereon must be paid by the executor before distribution without recourse to the beneficiary (*Farmers Loan & Trust Co.* v. *Winthrop, supra*). Congress decided that a net estate tax was the one that it could adopt for a permanent part of its tax system with greater political and constitutional safety by leaving estate share taxes (inheritance taxes) to the states and estate taxes to the federal government. Thus, it was found, there would be established a co-ordinate tax system with separate sources of revenue, theoretically and constitutionally at least, each supplementing the other without overlapping—a federal system which lent itself without friction to uniform application. It also was held that such a system was in the interest of equality and equity as between the states and the federal government and on the part of those who bore the burden of the tax.

Accordingly, by the provisions of the Revenue Act of September 8, 1916 (39 U. S. Stat. 777 *et seq.*; 6 U. S. Compiled Stat. 1916, ch. 10A, p. 7364, § 6336½a *et seq.*) the Congress imposed an "estate tax" as distinguished from an "inheritance tax" on estates of deceased persons and placed the burden of the tax upon the residuary estate rather than upon legacies (*Matter of Hamlin*, 226 N. Y. 407). In that act and in subsequent similarly worded acts including the act in effect at the death of Mrs. del Drago, it was provided that the tax should be upon the net estate as found according to the provisions of the act, chargeable to and payable by the executor before distribution *without recourse to the beneficiaries*, that it was not a tax upon the shares which the legatees should take or upon the persons taking those shares and that it was a tax upon the transfer of the estate as a whole at the time of death and not a tax on the person's privilege of receiving property under the will. Leaving no doubt that it was the purpose and intent of Congress to [fol. 95] exclude specific legatees, as such, from bearing any of the burden of the tax, the Revenue Act of 1916

(§ 208; 39 U. S. Stat. p. 779) contained a provision which has been carried forward by Congress in subsequent estate tax acts (*e. g.*, U. S. Code, tit. 26, § 826, par. [b]; 44 U. S. Stat. 79) that "if the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of; any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." The courts have uniformly refused to order proration or apportionment among legatees of the amount of the tax (*Matter of Hamlin, supra; Farmers Loan & Trust Co.* v. *Winthrop, supra; Matter of Oakes*, 248 N. Y. 280; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471; *Knowlton* v. *Moore, supra; Coolidge* v. *Long*, 282 U. S. 582; *Y. M. C. A.* v. *Davis, supra*).

Under articles 10 (L. 1909, ch. 62, as amd.), and 10-A (L. 1925, ch. 143, as amd.) the New York Legislature imposed inheritance taxes upon individual legacies. Under article 10-B (L. 1925, ch. 320) it was provided that the state death tax was "imposed upon the transfer of the net estate" (§ 249-a). The executor of every estate was made personally liable for the tax (§ 249-g). The executor was required to make a return within two months after the decedent's death or within a like period after qualifying as executor (§ 249-d), was forbidden finally to account unless he should have produced a final receipt or a certified copy thereof showing the payment of any taxes due (§ 249-c), was authorized to sell so much of the property of the estate as would enable him to pay the tax in the same manner provided by law for payment of a decedent's debt, and the State Tax Commissioner was authorized to maintain an action against the executor personally to recover the tax (§ 249-g). If any part of the tax was paid out of a distributive share, the person entitled to that share was entitled to reimbursement and tax upon the legacies, as such, was

effectively barred (§ 249-g). It was stated to be "the purpose and intent of this article that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." (§ 249-g.) Thus state death duties for purposes of [fol. 96] state revenue were assessable and collectible and the burden imposed in the same manner as the federal estate tax. In each sovereignty, the applicable statutes required the tax to be deducted and paid from the net estate before determination and computation of the shares payable to individual legatees.

After much agitation and effort in and out of the Legislature, a new state tax law applicable to estates of persons dying after September 1, 1930, was passed by the Legislature and became effective on that date (L. 1930, ch. 710, amdg. L. 1909, ch. 62, by adding a new article to be known as 10-C). By the provisions of the act itself, history of inheritance tax legislation of the state and proceedings antecedent to its passage, it was clearly shown that the act was passed for the purpose (1) of imposing death duties upon those who received the benefit and not upon the estate of the deceased and (2) to compel similar distribution of the federal estate tax notwithstanding and in the face of the federal law to the contrary (McKinney's historical note, vol. 13, p. 420). The act required that the tax be apportioned among the beneficiaries and the order of reimbursement of the previous act was reversed. It was provided that the executor should pay the tax out of the net estate, should not make reimbursement to legatees but that he was entitled to contribution from them. It was provided that in respect to persons dying after September 1, 1930, that article should supersede any article of the Tax Law "which imposes a transfer, inheritance or estate tax" (§ 249-mm) and that no exemption provided for in any other article of the Tax Law or of any other law of the state should be construed as being applicable under the new article. The act contains in itself no provision for apportionment and distribution of the tax among the legatees or distributees. In the face of probable necessary construction and possible unconstitutionality (*Knowlton* v. *Moore, supra*), other provisions were added (§ 249-t) and the Decedent Estate Law was amended (§ 124; L. 1930, ch. 709, effective September 1, 1930), whereby the rate of

the tax is fixed by the amount of the estate and the tax found due is apportioned among the various legatees according to that rate. Section 249-t of the Tax Law provides for exclusive jurisdiction in the Surrogate's Court "to finally determine the amount of the tax imposed by this article, and to fix and adjudge the proportions in which the same shall be borne by the persons interested in the estate as in section one hundred twenty-four of the decedent estate law provided." (§ 249-kk.) Section 124 of the Decedent Estate [fol. 97] Law provides that the death tax imposed shall "so far as is practicable and unless otherwise directed by the will of the decedent * * * be paid by the executor as such out of the estate before its distribution," and the executor shall not be required to distribute under the will any property with respect to which federal or state estate tax is imposed unless the amount thereof is apportioned to the distributees and such taxes are paid. Subdivision 1 of the section provides a scheme for apportionment and distribution and leaves it in the hands of the Surrogate equitably to carry that scheme into effect as far as the state tax is concerned. But it does not stop there. It further provides that the estate tax paid by an executor "under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, [with an exception (L. 1940, ch. 829, § 13)] shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues," and makes it mandatory on the executor, as to any property that does not come into his hands, "to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor."

[fol. 98] The Federal Revenue Act of 1918, in essential respects similar to the act of 1916 so far as the point at issue is concerned, was held in *Y. M. C. A.* v. *Davis* (*supra*, p. 50) to be "an excise upon the transfer of an estate upon death of the owner" and "not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death." So far as material, identical provisions are contained in the Federal Estate Tax Law applicable to the estate under consideration. Similar provisions to those contained in the 1916 act were construed as above in *Matter of Oakes* (248 N. Y. 280) and the act was held constitutional in *New York Trust Co.* v. *Eisner* (*supra*) on the basis of such a construction since the federal tax was an excise upon the right of transmission of the whole estate applicable from its beginning to final distribution of the estate. The federal policy to control the incidence of the estate tax is clearly established and declared not only in the law itself but by our own decisions (*Hamlin, Oakes* and *Winthrop* cases) and by necessary implication (*Matter of Neagle*, 39 Fed. Rep. 833). It was definitely established for uniform application in 1916 long prior to the policy-fixing tax statutes of the State of New York in 1930.

"It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances" (*DeVaughn* v. *Hutchinson*, 165 U. S. 566, 570). Nevertheless, every sovereignty, whether state or federal, possesses the power of regulating the manner and terms upon which property, both real and personal, within its dominion may be transmitted by will and of prescribing who shall and who shall not be capable of taking it (11 Am. Juris., Conflict of Laws, § 169; *Mager* v. *Grima*, 8 How. [U. S.] 490; *United States* v. *Perkins*, 163 U. S. 625; *Blythe* v. *Hinckley*, 180 U. S. 333; *Nielsen* v. *Johnson*, 279 U. S. 47; *Snyder* v. *Bettman*, 190 U. S. 249, 252; *Santovincenzo* v. *Egan*, 284 U. S. 30, 40; *Knowlton* v. *Moore*, *supra*; *Johnson* v. *Olson*, 92 Kan. 819; L. R. A. 1915E, 327 and note; *Rixner's Succession*, 48 La. Ann. 552; 33 L. R. A. 177; *Easton* v. *Huott*, 95 Iowa, 473; 31 L. R. A. 177). Under all sorts

of conditions, control over the right to hold and over the use, devolution and transmission of real and personal property of citizens within the United States has been exercised by Congress under the Constitution. It is a subject so broad that time and space and lack of importance to the present decision forbid extensive and detailed refer- [fol. 99] ences. The right to impose an estate tax and to regulate and control its incidence or to determine the right to take by will is not exclusive to the state (See cases *supra; Murdock* v. *Ward*, 178 U. S. 139; *Knowlton* v. *Moore, supra; Snyder* v. *Bettman, supra; New York Trust Co.* v. *Eisner, supra; Burnet* v. *Brooks*, 288 U. S. 378; *Matter of Hamlin, supra*) and that conclusion is not in any manner affected by the dicta in *Edwards* v. *Slocum* (287 Fed. Rep. 651) or by the misconstruction and misapplication of the reference to the lack of concern of the United States in the incidence of the federal estate tax in the *Eisner* case or in other state cases of similar import. The state has not, as it has been loosely said, exclusive power, as against the federal government, to say who and in what proportions recipients of a testator's bounty or distributees of an intestate's estate shall take of either the gross or net estate. *Knowlton* v. *Moore* (*supra*) the theory that the state may impose regulations as to the incidence of the federal estate tax to the exclusion of the right of Congress finally to fix the incidence of that tax because the state has the right to regulate successions was exploded.

The state's right to taxation is subordinate to that of the federal government and when the latter has acted in a particular field, the full import and all the implications of that act must control. The Congress has not only acted in the field of decedents' estate taxation to levy and collect duties but has expressly directed the manner of payment of such duties and excluded specific legatees from bearing the burden of any such levy. Such exclusion was final and conclusive and beyond the power of the state to vary or change. But if it be urged that failure of Congress to be more specific as to its purpose to exercise complete control of the incidence of the estate tax to the exclusion of state interference indicates an intent that the state might legislate on the subject, the answer is that silence does not give consent but implies only that there shall be no interference with the federal scheme (*Prigg* v. *Pennsylvania*, 16 Pet. [U. S.] 539; *United States* v. *Snyder*,

149 U. S. 210; *W. U. Tel. Co.* v. *Boegli*, 251 U. S. 315; *Hines* v. *Lowrey*, 305 U. S. 85, 91; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; *Erickson* v. *Macy*, 231 N. Y. 86, 91). In *Prigg* v. *Pennsylvania* it was urged that Congress had the exclusive power of legislation upon the subject-matter under consideration under the provisions of the Constitution of the United States, that if that power was not exclusive in Congress, still the concurrent power of the State [fol. 100] Legislature was suspended by the actual exercise of the power of Congress and that if not suspended still the statute of Pennsylvania in all its provisions applicable to that case was in direct collision with the act of Congress and, therefore, unconstitutional and void. It appeared in that case that Congress had legislated upon the subject-matter in controversy. Thereupon the court said: "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this court, in the case of *Houston* v. *Moore*, 5 Wheat. 1, 21, 22; where it was expressly held, that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for State legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed" (p. 617). In *United States* v. *Snyder* the court had under consideration the question of the right of the states under reserve power to interfere with the collection of a tax imposed by Congress. The court said: "The 8th section of the 1st article declares that 'the Congress shall have power to lay and collect taxes, duties, imposts and excises, • • • but all duties, imposts and excises shall be uniform throughout the United States.' The power to impose and collect the public burthens is here given in terms as absolute as the

language affords. The provision exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government. And both the grant of the power and its limitation are wholly inconsistent with the proposition that the States can, by legislation interfere with the assessment of Federal taxes, or set up a limitation of time within which they must be collected" (p. 214).

Since Congress had the power to lay and collect taxes on decedents' estates and determine where the burden should rest (*New York Trust Co.* v. *Eisner, supra*), those acts are the supreme law of the land and the state legislative acts in question, if in conflict with the federal law, are a nullity though enacted in the exercise of concurrent and not controverted powers (*Gibbons* v. *Ogden*, 9 Wheat. 1, 24, [fol. 101] 211; *Florida* v. *Mellon*, 273 U. S. 12, 17). That the federal and state statutes are in conflict on the question of where the burden of the federal tax shall fall is beyond doubt. The federal acts place the incidence of the tax upon the net residuary estate payable by the executor before distribution *without recourse to the individual legatees;* the state acts, though requiring the executor to pay, impose the burden of the federal estate tax upon the specific legatees and require the executor to deduct the *pro rata* burden from each legacy or collect such share or the part thereof he has paid from such legacy. So far as federal excises are concerned, the burden may not be regulated, distributed or apportioned by the state. Distribution must be accomplished under the federal law within the field within which Congress purports to act and has acted consistently and continually since long prior to 1930 when the state acts under attack went into effect. Repugnancy of the state acts to the federal acts render the former inoperative in so far as they purport to regulate the incidence of the federal estate tax and authorize and direct its distribution and apportionment. It is quite clear also that there can be no uniform operation of the federal estate act if each state is to determine for itself how distribution and apportionment of the tax shall be made.

In neither of the cases relied upon, in part at least, by the learned Surrogate (*Matter of Scott*, 274 N. Y. 538; certiorari denied, 302 U. S. 721; *Edwards* v. *Slocum*, 287 Fed. Rep. 651; affd., 264 U. S. 61, and *Y. M. C. A.* v. *Davis*, 264 U. S. 47) was the question here presented raised or

decided or a determination thereof necessary for the decision. The only satisfaction that respondents may derive from those cases is eked out of isolated sentences from the opinions which are pure dicta. In the *Scott* case the deceased left various life insurance policies with benefits payable periodically to beneficiaries named in the policies and the questions propounded and decided were whether (1) the benefits were included in the gross estate of deceased and fell within the intendment of section 124 of the Decedent Estate Law and (2) whether, if applicable, the section was repugnant to due process and involved unconstitutional impairment of the obligation of contracts. The only questions involved in the *Edwards* case were the power of the federal government to impose an estate tax upon the gross net estate of a deceased where a part passed to charity and the scope of the Federal Estate Tax Law as to the imposition of such a tax. In the *Davis* case (p. 48), arising in Ohio, the question was what effect payment by an executor of the federal estate tax should "have in the distribution of the estate among the legatees and beneficiaries under the will" under the provisions, properly construed, of the applicable Federal Estate Tax Law.

[fol. 102] The question of the justice or equity of placing the burden upon the residuary estate is entirely irrelevant to the question under consideration. Whether it is just and equitable in all cases to impose the tax upon the estate as a whole and not upon the specific legatees on the benefits they derive from the estate is a matter admitting of wide diversity of opinion. It is not the province of the courts to resolve that conflict. "The Congress has spoken and it is our function to interpret, not to legislate" (*Matter of Hamlin*, 226 N. Y. 407, 420; certiorari denied, 250 U. S. 672; *Farmers' Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 496, 497; certiorari denied, 266 U. S. 633; *Matter of Vanderbilt*, 231 N. Y. 297; affd., 309 U. S. 530). Deceased knew the law when she made her will, and then knew that in the absence of directions to the contrary in the will all federal estate taxes would be payable out of her residuary estate and that her net estate, after deduction of the federal tax, would alone be available for distribution to legatees and she thereby took into account any alleged inequities that might result in its application (*New York Trust Co.* v. *Eisner, supra; Matter of Vanderbilt, supra*). In making her will she had a right to rely upon the federal law as the only law fixing

the burden of the federal estate taxes. It is not our province to remake the will and to have it provide as her wish and intent that such taxes should be apportioned and prorated among the various specific legatees.

It follows that in so far as section 124 of the Decedent Estate Law or section 249-t of article 10-C of the State Tax Law authorize, require or direct distribution and apportionment of the federal estate taxes levied and to be levied upon the estate of the deceased among the legatees, they are repugnant to the provisions of the Federal Estate Tax Act of 1926 and amendments thereto, the Congress being competent to legislate on the subject of estate excises, and to the uniformity and supremacy clauses of the Federal Constitution and are, therefore, unconstitutional. Since what we have said above is decisive of the issue here involved, it is unnecessary to consider other grounds of unconstitutionality which appellants urge. The question of the repugnancy of the legislative acts to the New York State Constitution is not before us on this record and nothing said above is to be considered an expression of opinion on that subject.

The order of the Surrogate's Court should be reversed, with costs in this court and in the Surrogate's Court to each party appearing and filing a separate brief payable out of the estate and the matter remitted to the Surrogate's Court to proceed in accordance with this opinion.

[fol. 103] DESMOND, J. (dissenting):

The appellants are general legatees under the will of Josephine del Drago. Over their objection the Surrogate, in this accounting proceeding, prorated the federal estate tax equitably "among the persons interested in the estate" and ordered the executor to charge the prorated amounts against the persons so interested, including appellants. All this was in obedience to the command of section 124 of the Decedent Estate Law, applicable to this estate, since testatrix did not direct otherwise in her will. In this court there is raised by appellants only one objection to this prorating and apportionment, namely, that section 124, in so far as it directs such prorating and apportionment, is invalid as being in conflict with the "Supremacy Clause" of the Federal Constitution (Art. VI, cl. 2).

The estate of Josephine del Drago became subject at her death to a tax imposed by the United States on the

estates of decedents. No one questions that the tax so imposed is a true estate tax, falling on the estate itself and payable from the estate, and is not an inheritance tax which falls on the separate shares of the estate which go to the several beneficiaries. It is an excise tax laid upon the privilege of transmitting property rights at death. (*Matter of Vanderbilt*, 281 N. Y. 297, 311, 315.) To make this entirely clear, Congress provided (U. S. Code, tit. 26, § 826, par. [b]) that "so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." Congress never directed that the tax was to be paid out of the residuary estate and it "is not a tax upon a residue." (*Edwards* v. *Slocum*, 264 U. S. 61, 62.) Nor did Congress ever attempt to forbid the local probate courts to fix the final incidence of the tax by apportioning its burden among the several beneficiaries, after the executor has paid it. Indeed, there is much evidence from various sources that Congress was not at all concerned about this matter of final incidence and that its only intent was to set up a simple system whereby there should be taken out of sizable estates, before any distribution was had in those estates, a sum fixed by the federal statute. Congressman Kitchin, Chairman of the House Ways and Means Committee, said on the floor of the House in answer to a question: "We levy the tax on the transfer of the flat or whole net estate. We do not fol- [fol. 104] low the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution." (Congressional Record, 64th Congress [1916], pt. 15, p. 1942). The Senate Committee on Finance adopted this language in its own report on the bill (quoted in *Matter of Hamlin*, 226 N. Y. 407, at pp. 415, 416). The federal statute was, therefore, so drawn as not to control or determine the final incidence of the tax. As Circuit Judge Hough said in *Edwards* v. *Slocum* (287 Fed. Rep. 651, 653): "So far as the words of the statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees

cannot agree as to the burden bearing, the state courts can settle the matter."

In affirming the decision of the Circuit Court of Appeals in *Edwards* v. *Slocum*, the Supreme Court (264 U. S. 61, 63) gave at least seeming approval to the position taken by the Attorney-General that "the distribution of the burden of taxation among the several beneficiaries is a matter of state regulation." On the same day, February 18, 1924, the Supreme Court announced its decision in *Y. M. C. A.* v. *Davis* (264 U. S. 47). There, in discussing the effect on charities, ordinarily exempt from federal taxation of the deduction of this federal estate tax from the residue in which the charities took a share, the Supreme Court held that the charities were not exempted from the final burden of the tax despite the fact that the statute in computing the net estate, deducted amounts bequeathed to charities. Comparing the situation of the charities with that of a beneficiary who might take under a will the first $50,000 of an estate (this first $50,000 being at that time similarly exempted in computing the net estate) the Supreme Court remarked that the legatee who took that $50,000 might ultimately have to stand his share of the Federal estate tax, "if by the law of the state, such should be its incidence" (p. 51).

We need not take time for a careful inquiry as to whether or not these expressions in the federal decisions are dicta. Dicta or not, binding on us or not, they cannot be ignored, particularly when they have been so long regarded as stating the law, and when they agree with the expressed views of the members of Congress and with the logic of the situation. Why should Congress concern itself as to the ultimate resting place of this tax? Having seen to it that the federal government's toll shall always be taken before the beneficiaries divided up the estate, having commanded the executor to pay the tax before the distribution begins, and hav- [fol. 105] ing provided adequate penalties for his failure so to do, what matters it to Congress how local law afterwards apportions the tax among the legatees or devisees? Long before the turn of the legatees and devisees comes, the United States Collector of Internal Revenue has gotten the government's tax money and closed the books on the estate. Thus in no real or reasonable sense can it be said that a later apportionment interferes with the enforcement of the Federal Tax Law, or modifies or changes that tax.

Early in the history of the federal statute, and before New York State had an apportionment statute, this court held that the executor was bound to charge the whole federal tax to the residue, as the state law then stood. (*Matter of Hamlin*, 226 N. Y. 407; certiorari denied, 250 U. S. 672.) This decision does not rest on any federal statute directing that the tax be charged finally, or in the first instance, upon the residue, for there is no such statute. The federal statute says only that the tax "shall be imposed upon the transfer of the net estate" (U. S. Code, tit. 26, § 810) and that "so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution" (U. S. Code, tit. 26, § 826). From these statutory provisions directing the executor to pay the tax to the Collector out of the net estate before distributing it, it follows mathematically, in most estates, that the original source of payment is the residue of the estate. It is quite a long jump from that interpretation of the "net estate" provision in the federal statute, to the position, here taken by appellants, that the statute somehow amounts to a prohibition against any prorating of the tax by a state among beneficiaries after it has been paid to the United States out of the residue.

Even without a state prorating statute, there are cases where, mathematically, the tax cannot be paid out of the residue, but must be charged immediately on the several bequests or devises. Suppose a case where there is no residue, as where the general legacies equal or exceed the actual net estate. In such a case the executor, paying the federal tax from the "net estate," is in fact deducting it from the amount available for the general legacies. Would he then not have to prorate it against those legacies, whether or not any statute so directed?

The *Hamlin* case (*supra*) and the later cases of *Farmers' Loan & Trust Co.* v. *Winthrop* (238 N. Y. 488) and *Matter of Oakes* (248 N. Y. 280) held, we have seen, that under the statutes as they then stood the tax was ordinarily a charge upon the residue, "primarily at least" (*Oakes* opinion at p. 282). The resulting situation had its difficulties. The New York State Commission to Report Defects in the Law of Estates, which included among its members some of the [fol. 106] recognized experts in the field, reported as follows in 1930: "Experience has demonstrated that in most estates the residuary legatees are the widow, children, or

nearer and more dependent relatives. This has been one of the objections to the Federal Estate Tax Law in New York. The burden of the tax has been imposed upon the residuary legatees not only as to the property passing under the will, but also upon transfers whether by gift or *inter vivos* trust, or other form of transfer taking effect at death. These transfers are included in both the Federal Estate Tax Law and under the proposed New York State Estate Tax Law as subject to taxation. Thus the residuary legatees have been compelled to pay the entire estate tax, including the tax assessed on testamentary transfers and those taking effect at death." (Combined Reports of Commission to Investigate Defects in Laws of Estates [1928-1933]. Reprint ed., p. 338.) The Commission then proposed what is now section 124 of the Decedent Estate Law, to provide statutory authority for the equitable apportionment of the estate taxes, both federal and state, citing as authority for the legality of such an apportionment statute, *Edwards* v. *Slocum* (*supra*).

Section 124, so proposed, was enacted by the Legislature and became effective in 1930. At least one other state, Pennsylvania, has a similar prorating statute (Pennsylvania Stat. Annotated [Purdon] tit. 20, § 844), passed in 1937. So far as appears, no court, state or federal, has ever held that a state is without power to pass such an act. The constitutionality of section 124 as against other claims of invalidity was upheld by this court in *Matter of Scott* (274 N. Y. 538; certiorari denied, 302 U. S. 721). In that case there was not advanced at all the theory of unconstitutionality for which appellants here contend, *i. e.*, that section 124 is in conflict with the so-called Supremacy Clause of the United States Constitution (Art. VI, cl. 2).

We do not find here any such interference by the state with the federal taxing power, or any attempt by the state statute to assert supremacy. We see no possible conflict between the command of the federal estate tax statute that, unless otherwise directed by the will, the tax be paid out of the net estate and the provision of section 124 that, unless otherwise directed by the will, the tax be apportioned. We have shown, above, that the interest and activity of the United States ceases when the executor has paid the tax, that the federal statute not only does not make the tax a non-transferable charge on the residue, but does not command payment from the residue at all. How then can there

be any conflict? Surely appellants are not claiming that the field of estate taxation is one altogether sacred to the federal power, or that it is one of those fields from which the states are excluded, once Congress has entered in. Both [fol. 107] the national and the state governments have power to impose such taxes (*Snyder* v. *Bettman*, 190 U. S. 249). The power of Congress so to legislate is not superior to that of the State Legislatures: "* * * in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States, and not in Congress" (*Knowlton* v. *Moore*, 178 U. S. 41, 58). Having in fullest measure the power of "regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance" (*Mager* v. *Grima*, 8 How. [U. S.] 490, 493), a state, it would seem, may enact any reasonable measure to control such transmittal at death, by the levying or apportionment of taxes. So complete is the state's power in this respect that it may impose such a tax on the United States of America itself, when the United States is a legatee (*United States* v. *Perkins*, 163 U. S. 625, 627) and may tax an estate or a legacy consisting entirely of United States bonds, although the bonds were issued under a federal statute declaring them to be exempt from state taxation in any form (*Plummer* v. *Coler*, 178 U. S. 115). Our conclusion that the Congress has not attempted to restrain the states from fixing the final incidence of this federal estate tax, is strengthened by the authorities just cited which go far toward holding that such an attempted restraint by the Congress on the states would be an invasion of the state's power to regulate the manner and term of transmitting property by will or inheritance.

Finally, there is a strong presumption in favor of a state statute, that it conforms to, and does not conflict with, the Federal Constitution. "Doubts on this point are to be resolved in favor of, and not against, the State" (*Corporation Commission* v. *Lowe*, 281 U. S. 431, 438). Practical considerations impel us to the same result. Why should we strain to hold this statute unconstitutional, when in so holding, we produce a result which the testatrix plainly did not intend? The will here, carefully drawn and disposing of a large estate, was made in 1934, four years after section

124 went into effect. Testatrix and her advisers are presumed to have known and must have known that, by the terms of section 124, she could, by inserting a few words in her will, forbid apportionment of the estate taxes and command their payment from the residue. She chose not to do so. We should not do it for her.

The order of the Surrogate should be affirmed, with costs against appellants.

Finch, Lewis and Conway, JJ., concur with Rippey, J.; Desmond, J., dissents in opinion in which Lehman, Ch. J., and Loughran, J., concur.

Order reversed, etc.

[fol. 108] COURT OF APPEALS.

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 27th day of November in the year of our Lord one thousand nine hundred and forty-one, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur November 28, 1941.

In the Matter of the Petition for the Judicial Settlement of the Account of Proceedings of GIOVANNI DEL DRAGO & ANO., as Exrs., &c., of Josephine del Drago, dec'd., &c.

Be It Remembered, That on the 20th day of March in the year of our Lord one thousand nine hundred and forty-one, Giovanni del Drago, individually, &c., and another, the appellants in this cause, came here unto the Court of Appeals, by Ludwig M. Wilson and another, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Surrogates' Court, New York County. And Byron Clark, Jr., as executor, &c., and others, &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Grant, Clark & Fox and others, their attorneys.

[fol. 109] Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Henry Cohen, of counsel for the ap-

pellants; and by Mr. Lawrason Riggs, Jr., of counsel for the respondent—special guardian, &c.; submitted by other respondents; and after dued eliberation had thereon, did order and adjudge that the order of the Surrogates' Court appealed from herein be and the same hereby is reversed with costs in this court and in the Surrogates' Court to each party appearing and filing separate brief payable out of the estate, and the matter remitted to the Surrogates' Court to proceed in accordance with the opinion of Rippey, J. herein.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogates' Court, New York County, there to be proceeded upon according to law. Therefore, it is considered that the said order of the Surrogates' Court be reversed with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court before the Surrogates [fol. 110] thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, November 28, 1941:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 111] State of New York,
In Court of Appeals:

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-second day of January A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, presiding.

In the Matter of the Petition for the judicial settlement of the Account of Proceedings of GIOVANNI DEL DRAGO & ANO., as Exrs. &c., of Josephine del Drago, Deceased, and for a construction of said Will and for instructions

GIOVANNI DEL DRAGO, ind., & ANO., Appellants,

BYRON CLARK, JR., as Exr., LAWRASON RIGGS, JR., & ORS., &c., Respondents

A Motion for a re-argument of the above cause, having been heretofore made upon the part of the respondent, Lawrason Riggs, Jr., as Special Guardian &c., herein, and papers having been duly submitted thereon, and due deliberation thereupon had;

Ordered, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A Copy.

Stewart G. Cook, Deputy Clerk. (Seal, State of New York, Court of Appeals.)

[fol. 112] STATE OF NEW YORK,
In Court of Appeals:

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-second day of January A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, Presiding.

In the Matter of the Petition for the judicial settlement of the Account of Proceedings of GIOVANNI DEL DRAGO & ANO., as Exrs. &c., of Josephine del Drago, Deceased, and for a construction of said Will and for instructions

GIOVANNI DEL DRAGO, ind., & ANO., Appellants,

BYRON CLARK, JR., as Exr., LAWRASON RIGGS, JR., & ORS., &c., Respondents

A motion to amend the remittitur in the above cause having heretofore been made herein upon the part of the respondent, Lawrason Riggs, Jr., Special Guardian &c.,

papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is denied upon the ground that the opinions in this Court show that upon the appeal a Federal question was presented and necessarily passed upon.

A copy.

Stewart G. Cook, Deputy Clerk. (Seal, State of New York, Court of Appeals.)

[fol. 113] At the Surrogate's Court of the County of New York, at the Hall of Records, on the 16th day of February, in the year One Thousand, Nine Hundred and forty-two.

Present: Hon. James A. Foley, Surrogate.

In the Matter of the Petition for the Judicial Settlement of the Account of Proceedings of Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, Deceased, and for a construction of said Will and for instructions

Order on Remittitur

An appeal having been taken to the Court of Appeals from those parts of the decree entered in the office of the Clerk of the Surrogate's Court, New York County, on the 19th day of November, 1940, which are as follows:

"Ordered, Adjudged and Decreed, that all of the objections of said Marcel del Drago and Giovanni del Drago, individually, to the constitutionality of Section 124 of the Decedent Estate Law and to the equitable proration of the Federal Estate Tax on the estate of said decedent against the respective interests of all the beneficiaries named in the Will, be, and the same hereby are overruled, and that no ground of unconstitutionality, attaches to the provisions of Section 124 of the Decedent Estate Law nor to the method of the equitable apportionment of the Federal Estate Tax and New York Estate Tax pursuant to its terms;

* * * * * * *

Ordered, Adjudged and Decreed, that the amount of the Federal and New York State estate taxes which may be paid by the executors be equitably prorated and apportioned

pursuant to the provisions of Section 124 of the Decedent Estate Law, and that such proration be included in the decree to be entered on a subsequent accounting after such taxes have been fixed and paid;"

[fol. 114] and from so much of the supplemental decree entered in the office of the Clerk of the Surrogate's Court, New York County, on the 24th day of December, 1940, as reads as follows:

"It is Ordered, Adjudged and Decreed that the decree heretofore entered herein on November 19, 1940, be and the same hereby is in all respects confirmed; and it is further Ordered, Adjudged and Decreed that all of the terms and provisions of said decree shall be binding upon Clemente Francesco del Drago, an infant under the age of fourteen years with the same force and effect as if said infant had been a party to this proceeding at the date of the entry of said decree";

And after due deliberation the Court of Appeals having ordered and adjudged that the orders so appealed from, be reversed with costs in that Court and in the Surrogate's Court, to each party appearing and filing a separate brief, payable out of the estate, and that the matter be remitted to the Surrogate's Court to proceed in accordance with the opinion of the Court of Appeals, and the remittitur of the Court of Appeals, together with a certified copy of the order of that Court having been duly filed in the office of the Clerk of the Surrogate's Court of New York County on the 5th day of December, 1941;

And a motion for reargument having been made upon the part of Lawrason Riggs, Jr., as Special Guardian, etc., on which the Court of Appeals made its order dated the 22nd day of January, 1942, denying said motion with $10.00 costs and necessary printing disbursements, and a motion to amend the remittitur having been made upon the part of [fol. 115] said Special Guardian, which the Court of Appeals denied by its order dated the 22nd day of January, 1942, upon the ground that the opinions in said Court show that upon said appeal a Federal question was presented and necessarily passed upon, and certified copies of said orders denying said respective motions having been duly filed in the office of the Clerk on the 3rd day of February, 1942,

Now, upon reading the remittitur of the Court of Appeals dated November 28, 1941, and certified copies of the orders of said Court dated January 22, 1942, hereinbefore described, and upon reading and filing the application for an allowance of counsel fees to Henry Cohen and Ludwig M. Wilson and the affidavits of said Henry Cohen and Ludwig M. Wilson, both verified December 31, 1941, and the reply affidavit of Ludwig M. Wilson, verified January 9, 1942, in support of the said application, and on reading and filing the affidavit of Frank C. Laughlin, verified January 7, 1942, in opposition, and on filing the written decision of the Surrogate, it is

Ordered, Adjudged and Decreed that the order of the Court of Appeals dated the 27th day of November, 1941, be and the same hereby is, and its said respective orders, dated the 22nd day of January, 1942, be and the same hereby are, made the orders of this Court; and it is further

Ordered, Adjudged and Decreed, that the said application for allowance and counsel fees payable out of the estate to Henry Cohen and Ludwig M. Wilson be and the same hereby is denied upon the law; and it is further

Ordered, Adjudged and Decreed, that the fixation of the allowances to the Special Guardians be held in abeyance [fol. 116] until after the decision of the United States Supreme Court on the question of the constitutionality of Section 124 of the Decedent Estate Law; and it is further

Ordered, Adjudged and Decreed, that upon the entry of this order and decree, the Executors shall pay the costs and disbursements taxed pursuant thereto, out of the estate of said decedent, as follows:

To Ludwig M. Wilson and Robert W. Maloney, as attorneys for Marcel del Drago and Giovanni del Drago, individually, the sum of $656.42, and the further sum of $30.00.

To Lawrason Riggs, Jr., Special Guardian, the sum of $112.15,

and it is further

Ordered, Adjudged and Decreed, that both the order of this Court entered in the office of the Clerk of the Surrogate's Court, New York County, on the 19th day of November, 1940, and the supplementary order of this Court entered in the office of its clerk on the 24th day of Decem-

ber, 1940, be and the same hereby are amended by eliminating from the order dated the 19th day of November, 1940, those portions thereof which are as follows:

"Ordered, Adjudged and Decreed, that all of the objections of said Marcel del Drago and Giovanni del Drago, individually, to the constitutionality of Section 124 of the Decedent Estate Law and to the equitable proration of the Federal Estate Tax on the estate of said decedent against the respective interests of all the beneficiaries named in the will, be, and the same hereby are, overruled, and that no ground of unconstitutionality attaches to the provisions of Section 124 of the Decedent Estate Law nor to the method of the equitable apportionment of the Federal Estate Tax and New York Estate Tax pursuant to its terms;

. . . . . .

[fol. 117] Ordered, Adjudged and Decreed, that the amount of the Federal and New York State estate taxes which may be paid by the executors be equitably prorated and apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law, and that such proration be included in the decree to be entered on a subsequent accounting after such taxes have been fixed and paid;"

and by substituting in place of such eliminated parts of the aforesaid order the following:

"Ordered, Adjudged and Decreed, that the objections of said Marcel del Drago and Giovanni del Drago, individually, be and the same hereby are sustained insofar as they demand that the executors refrain from apportionment of the Federal Estate taxes levied and to be levied upon the estate of the deceased among the persons beneficially interested in the estate;

. . . . . .

Ordered, Adjudged and Decreed, that the payment of the said Federal Estate tax by the Executors out of the general estate of the decedent without proration against the respective interests of the several beneficiaries named in the Will, be and the same hereby is directed and approved; and it is further

Ordered, Adjudged and Decreed that the amount of the New York State Estate taxes which have heretofore been or may hereafter be paid by the Executors, be prorated

and apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law and that such proration be included in the decree to be entered on a subsequent accounting after such New York State Estate taxes have been fixed and paid."

James A. Foley, Surrogate.

Filed, Feb. 18, 1942.

[fol. 118] State of New York,
County of New York, ss:

I, George Loesch, Clerk of the Surrogate's Court of said county, do hereby certify that I have compared the foregoing copy of the remittitur of the Court of Appeals filed December 5, 1941; two copies of orders of the Court of Appeals filed February 3, 1942, denying motions for reargument and for amendment of aforesaid remittitur; and the order of the Surrogate on the aforesaid remittitur filed February 18, 1942, in the voluntary accounting proceeding in the estate of Josephine del Drago, deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of New York this 18th day of February in the year of our Lord one thousand nine hundred and forty-two.

George Loesch, Clerk of the Surrogate's Court.
(Seal.)

P-2549-1937
M

[fol. 119] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 30, 1942

The petition herein for a writ of certiorari to the Surrogate's Court, New York County, State of New York, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 46,308. New York, Surrogate's Court, New York County. Term No. 980. Lawrason Riggs, Jr., Special Guardian, Petitioner, vs. Giovanni Del Drago, Marcel Del Drago, Byron Clark, Jr., as Executor, et al. Petition for a writ of certiorari and exhibit thereto. Filed February 26, 1942. Term No. 980, O. T. 1941.